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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL CUARON, *Petitioner,*

v.

LUIS J. ESTRADA, *Respondent,*

and

LONNIE DAWSON and EUGENE KLECAN, *Petitioners,*

v.

MARIA ELENA HOLGUIN, JAMIE HOLGUIN, RUTH LEGARDA and ALFREDO LEGARDA, *Respondents.*

and

DANIEL CUARON, *Petitioners,*

v.

THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioners for Removal under 28 U.S.C. § 1443 deprived of their constitutional and legal rights by the United States District Court which remanded their cases without affording Petitioners any opportunity for a hearing? Was it error in any event to remand these cases which were removed under 28 U.S.C. § 1443?

2. Were the Petitioners-Appellants in the Tenth Circuit Court of Appeals deprived of their legal and constitutional rights under 28 U.S.C. § 1447(d) when their appeals were summarily dismissed without the usual appellate procedures being followed? Was there error in the substance of the Opinions of the Tenth Circuit dismissing these appeals taken pursuant to 28 U.S.C. § 1447(d)?

3. Can sanctions be imposed against attorneys for litigating Civil Rights Removals and, if so, can such sanctions be imposed without any notice or hearing?

4. Can a United States Court of Appeals ever enjoin individual attorneys from filing future Removals under 28 U.S.C. § 1443 and appeals of such Removals?

5. Are the use of sanctions and show-cause orders which threaten disciplinary action a form of intimidation which violates the constitutional right of free access to the courts? Is the right to a good professional name protected by the Constitution and, if so, is it applicable to federal judicial officials in their Opinions and Orders?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties to the litigation below by virtue of Order to Show Cause issued in Mandamus Cause 80-1792.

Attorney Firm Klecan & Roach

EUGENE E. KLECAN
JAMES T. ROACH
JANET K. SANTILLANES

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THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Daniel Cuaron, Lonnie Dawson and Eugene Klecan respectfully petition for a writ of certiorari to review the opinions of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 14, 1980.

OPINIONS BELOW

The remand orders entered in these cases by the United States District Court for the District of New Mexico on July 16, 1980 (Cuaron v. Estrada) and May 6, 1980 (Dawson v. Holguin) which appear at the Appendix at 3a and 41a, are unreported. The opinions of the United States Court of Appeals for the Tenth Circuit, also unreported, appear at Appendix 1a.

JURISDICTION

The orders of the United States Court of Appeals for the Tenth Circuit dismissing these appeals were entered on November 14, 1980. The orders denying Petitioners' motions for rehearing were entered on January 16, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

28 U.S.C. § 1443

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1447(d)

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title [28 USCS § 1443] shall be reviewable by appeal or otherwise.

STATEMENT OF FACTS

Estrada v. *Cuaron*

The Complaint in this case, which involves a death resulting from an automobile accident, was filed in the State District Court. On July 11, 1980, this case was consolidated with 67 other cases pending in state court. The consolidated cases were then referred to a three-judge panel which had been formed without any authority in law, solely to act on these 68 cases. The consolidated cases were removed by Petitioners on July 16, 1980, pursuant to 28 U.S.C. § 1443. The basis for the Petition for removal was the creation of the three-man state court. There is no provision in state law for such a court. That court was created by state judicial officials, at a secret meeting, solely to handle the 68 cases which had been consolidated by the state court. Petitioners claimed that this conduct was under color of law and constituted a violation of his civil rights, entitling him to remove the case under 28 U.S.C. § 1443. No other litigant in New Mexico, to Petitioner's knowledge, has ever had his case assigned to a three-man court created solely to handle certain pending cases. A hearing at the Federal District Court level would have permitted Petitioner to present these facts to the Federal District Judge and to argue that removal under 28 U.S.C. § 1443 was proper under the circumstances. The cases were remanded by the federal district judge within hours after they were removed, without any motion to remand having been filed. No hearing whatsoever was given to Petitioners on the validity of the removal. Petitioners filed a Notice of Appeal on July 17, 1980, pusuant to 28 U.S.C. § 1447(d). The Tenth Circuit Court of Appeals, on August 20, 1980, informed Petitioners that it was considering summary dismissal of their appeal. The Court of Appeals ordered a very limited brief from Petitioners restricted to the issue of whether 28 U.S.C. § 1447(d) authorized appellate review of the remand order appealed from. No further briefs were allowed and no oral argument was allowed. On November 14, 1980, the Court of Appeals dismissed the appeal and on January 16, 1981, denied Petitioners Motion for Rehearing.

Cuaron v. Mechem

On July 30, 1980, Petitioner Cuaron filed a Petition for Mandamus in the Tenth Circuit Court of Appeals. The Petition was directly to District Judge Edwin Mechem of the United States District Court for the District of New Mexico. That Petition was addressed primarily to the lack of any notice or hearing on the removal of the 68 consolidated cases prior to Judge Mechem's Orders of remand. That Order was entered approximately four hours after the removal prior to that remand order. In response to that Petition for Mandamus, the Tenth Circuit Court of Appeals filed an order directing Petitioner's attorneys to show cause why they should not be forever enjoined from filing removals under 28 U.S.C. § 1443 and to further show cause why they should not subject to professional discipline for having filed a removal. Petitioner's attorneys were directed to appear before the Tenth Circuit in Denver, Colorado, to answer to the show cause order of the Court of Appeals. Petitioner's attorneys did appear, as ordered, before the Court of Appeals on November 18, 1980. On December 11, 1980, The Tenth Circuit entered an order denying the Petitioner for Mandamus holding it to be "frivolous" but in all other respects quashing its order to show cause. The Petition for Writ of Mandamus appears at Appendix 68a, the Court of Appeals' show cause orders appears at Appendix 77a, the response of Petitioner's attorneys to that show cause order appears at Appendix 80a, and The Court of Appeals' December 11, 1980, orders appears at Appendix 84a.

Holguin and Legarda v. Dawson

The Complaint in this lawsuit which arises out of an automobile accident, was filed in State District Court. The case was tried once and ended in a mistrial. When the case was called for trial a second time, the same jury panel which had been assigned to the first trial was called again, in violation of Petitioner's Constitutional and legal rights. On April 4, 1980, a Petition for removal was filed under 28 U.S.C. § 1441 and § 1443. The case was remanded by the federal district judge without any hearing whatsoever even though all parties had

requested a hearing. Petitioner filed his Notice of Appeal on June 5, 1980, pursuant to 28 U.S.C. § 1447(d). The Tenth Circuit Court of Appeals informed Petitioner that full briefing would not be allowed and that no oral argument would be allowed. On November 14, 1980, the Court of Appeals dismissed the appeal and on January 16, 1981, denied Petitioner's Motion for rehearing.

Holguin and Legarda* v. *Klecan

In addition to remanding the case removed by Petitioner Dawson, as described above, the federal district judge imposed sanctions directly against Petitioner's attorney, Eugene Klecan. No hearing was ever allowed on whether such sanctions were proper. Neither Petitioner nor his attorney were ever given an opportunity to defend themselves against the imposition of sanctions.

JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the United States District Court for the District of New Mexico was that these cases had been removed from state court under 28 U.S.C. Sec. 1443. The cases were then appealed to the Court of Appeals for the Tenth Circuit under 28 U.S.C. Sec. 1447(d).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Lack of Hearings Before Remand was Error and Unconstitutional

In the verified Petition for Removal (see Page 5a of the Appendix) Daniel Cuaron asserted, after referring to the illegal proceedings in the state court, under color of law, that "Removal is sought pursuant to 28 USC § 1443." Also in the Petition for Removal it was stated "that a three-man court was illegally created and illegally staffed by and thru an illegal judges meeting, illegally convened for the purpose of discriminating against the petitioners and therefore was a conspiracy to violate the civil rights of the Petitioner under color of law." Petitioner never got a chance to argue the law of the above or to state, assert and prove the facts relating thereto. Petitioner

asserts in his Petition for Removal, "It is in violation of Petitioner's civil rights." The Removal therefore clearly asserts a Removal under 28 USC § 1443 based on a conspiracy which is forbidden by 42 U.S.C. § 1985. What happened to the Removal from the viewpoint of constitutional rights is related to the lack of any hearing at the United States District Court level and with the happening at the Court of Appeals when an appeal took place pursuant to § 1447(d). The Remand Order of U.S. Judge Mechem is to be compared with the summary dismissal of the appeal by the Tenth Circuit on a summary calendar with no oral arguments allowed. The Tenth Circuit Opinion reads like a review of a § 1443 Removal where a hearing has taken place. This is a false factual premise since no hearing in fact occurred. The Opinion claims justification from *Johnson* v. *Mississippi*, 421 U.S. 213 (1975), but draws its own facts as if *It* had conducted a hearing. So the case passed through two levels of the federal judiciary without any hearing and falsely emerges as if the facts were known. It merely asserts that the "facts" show clearly that the requisites of *Johnson* v. *Mississippi, supra,* have not been met. *Johnson* v. *Mississippi* cannot be applied until the facts are established by a hearing.

The § 1443 Removal Petition was a verified petition and is the only document that could possibly be evidentiary material in the entire procedure through the U.S. District Court and the Court of Appeals. A verified Petition for Removal has status. *Smith* v. *City of Jackson*, 385 F.2d 705 (5th Cir. 1966). The headnote of the foregoing case is appropriate: Court of Appeals was required to vacate judgment of the federal District Court where Court of Appeals was not certain whether opportunity for full evidentiary hearing was provided by District Court. 28 USCA § 1443, 1446. There is no doubt that Federal District Judge Mechem did not accord a hearing. He remanded the case back within a few hours. In *Smith* v. *City, supra,* there is mention of an affidavit "submitted contradicting removant's petition." Apparently the Fifth Circuit was not convinced that the required due process hearing had occurred because it remanded the case back to the lower court for a full

due process hearing on the Removal Petition. No distinction between kinds of hearings is pertinent in our case since none at all took place.

The facts have been pointed out as involving a conspiracy under 42 § 1985 (see Petition for Removal, Appendix 5a). The Order of Removal merely states that "I have concluded that the case was removed improvidently and without jurisdiction." The above is the language of the statute which governs procedures on removals but is a conclusion which requires a factual basis. With no hearing there is no factual basis and the conclusion falls of its own unsupported weight. The Remand Order goes on to deny in terms of the Removal statute itself, § 1443, that a right of removal existed. Again this is a conclusion without any support because no hearing was allowed, and secondly, the Order fails to discuss the allegations in the Removal Petition.

Supporting documents showing a conspiracy, the use of judicial processes by means of a secret letter, and the intention of a new court to help out the opponents of Daniel Cuaron, were furnished to the Tenth Circuit, in an effort to show that there was documentary evidence of a conspiracy forbidden by 42 USC § 1985, but to no avail. Both Federal Courts refused to look into the facts. It seems as if both Courts drew the conclusion that because a civil rights removal was involved that the constitutional rights of the removing Petition ceased to be applicable. The Tenth Circuit Opinion, which was "Not for Routine Publication," states that "there is absolutely no support factual or otherwise for any claims with respect to the civil rights of the defendants." The Courts could not know whether there was any support for Petitioner's claims without giving Petitioner a hearing.

A review of the Remand Order, filed by the District Court in *Holguin* v. *Dawson*, discloses that Judge Mechem did not cite a single case to support his conclusion that this case was not properly removed. The Tenth Circuit Opinion cites several cases which do not support the conclusions reached by the Court of Appeals. The case of *Johnson* v. *Mississippi*, 421 U.S.

213 (1975), is cited by the Court of Appeals. The case at bar is a civil case. Petitioner was never given an opportunity, in either the District Court or the Court of Appeals, to argue his position that his civil case was properly removable and that *Johnson* v. *Mississippi, supra*, was not controlling.

In the Remand Order Judge Mechem gives his negative answer to the § 1443 Removal in one paragraph on page 3, for which he cites no authority. His Remand says that the "civil rights claim . . . is not directed at the plaintiffs in this action but rather toward the administrative and judicial officials of Grant County." The Remand goes on to say that the defendant who removed the case should have sued Grant County judicial officials "in a separate action, for any alleged civil rights violations." Since Civil Rights violations must be under color of state law to be Civil Rights violations, it seems that he is saying that there is no right of removal at all for violations of Civil Rights, because Civil Rights violations cannot occur between strictly private parties. It is the actions of public officials which gives rise to the right to remove in a civil case although it is conceivable that the plaintiff could conspire with public officials. 42 USC § 1985. Tenth Circuit does not discuss this nor adopt it. Since no authority is cited, and none can be conceived by the Petitioner, we submit that it is without value as a grounds for the remand. The palpable error arises from an apparent assumption that the removing Petitioner is suing the plaintiff. It seems to be the District Judge's belief that the § 1443 Removal is a kind of counterclaim. The above paragraph is his only basis for remand. It does assume a "viable Civil Rights claim" but his legal basis for the Remand is not valid and has no authority. Therefore we submit that the District Judge states no legal basis for the remand and consequently his condemnation of defense counsel and assessing sanctions against him is based upon a legal misconception of the law in § 1443 removals. For a § 1443 removal to be vexatious, frivolous, and brought for the purposes of delay, we should look to the merits of the removal itself and not to the vehemence of the language imposing the sanctions. The Judge uses the term "judicial officials" as being the

proper defendants in a separate suit but of course they have an immunity. *Dennis* v. *Sparks, supra.* We conclude by asserting that the Remand Order provides no legal basis for itself and since a hearing was expressly denied there is also no constitutional basis for it. Since the sanctions imposed must find some support in both, we request that both the Remand Order and sanctions be reversed and the Tenth Circuit Opinion be set aside.

Where a court cannot legally dispute a legal procedure by a party and his attorney, it is not an apt substitute to say that the legal procedure was "frivolous."

Before a case removed under 28 USC § 1443 can be remanded, a hearing must be held by the District Court to determine whether the case is properly removable. *Smith* v. *City of Jackson, Mississippi,* 358 F.2d 705 (5th Cir. 1966). *McGee* v. *City of Meridian, Mississippi,* 359 F.2d 846 (5th Cir. 1966). *Mahaney* v. *State of Louisiana,* 427 F.2d 850 (5th Cir. 1970). *Wyche* v. *State of Louisiana,* 394 F.2d 927 (5th Cir. 1967). *Jerry Walker* v. *State of Georgia,* 405 F.2d 1191 (5th Cir. 1969). The Federal District Judge has consistently refused to allow any hearing on the cases removed from state court under 28 U.S.C. § 1443.

In the mandamus proceeding of Cuaron v. Mechem, the Tenth Circuit Court of Appeals was directly presented with the lack of any hearing in the Court below. The mandamus proceeding asked the Court of Appeals to direct the lower court to grant a hearing on the removals under 28 U.S.C. § 1443. The Court of Appeals refused to so direct the lower court. Furthermore in the mandamus proceeding the Court of Appeals threatened Petitioner's attorneys with injunctions and disciplinary proceedings for filing the removals. There is thus a continuous refusal on the part of the trial and appellate courts in these cases to acknowledge that due process requires a fair opportunity to be heard. At every step of the way, Petitioners have been denied the opportunity to be heard and have been threatened with sanctions for attempting to obtain a hearing in the federal court system.

The Imposition of Sanctions Was Unwarranted and Threatens Litigants' Rights to Assert Their Claims in the Judicial System

The Federal District Judge in Holguin v. Dawson imposed sanctions directly against Petitioner's attorney in the sum of three hundred fifty dollars. That amount was to reimburse the Respondents for their "costs" incurred because of the removal. The "costs" assessed against Petitioners were in fact attorneys fees as the Respondents incurred no other costs as a result of the removal. Thee sanctions were imposed without affording Petitioner any opportunity whatsoever to be heard. This Court has recently held that, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc.* v. *Piper*, 100 S.Ct. 2455, 2464 (1980). That is precisely what did occur in this case. The federal courts erred by imposing sanctions against Petitioner's attorneys for filing § 1443 Removals.

District Judge Mechem, without holding any hearing, states that "[h]aving considered the motion and memoranda of counsel and further being fully advised in the premises, I conclude that defendant's petition for removal is frivolous and brought for purposes of delay." None of the parties saw the Judge or were permitted a hearing, despite the request of both parties that a hearing be held.

To which the judge responded—"the parties' request for hearing on this matter be and hereby are denied." App. p. 44a.

The Tenth Circuit Opinion states that the "record amply demonstrates that the removal litigation was conducted in manifest bad faith and brought solely for the purposes of delay." There is no such record and reference can only have been made to the rash judgments by the lower court judge. When the opinions are solely the word of the judiciary, an attorney who has been falsely accused in the lower court cannot stop the continuation of the false statements by the appellate court, especially when he is denied an oral argument by that appellate court. The statement in the Opinion that "there was an

express finding that the matter had been removed in bad faith, for purposes of delay" and that Attorney Klecan "was the prime mover behind the lamentable tactics employed here" carries the false implication that a hearing took place. It is universally understood by lawyers that express findings cannot be made except on evidence which normally cannot be furnished without a hearing. However the Tenth Circuit wishes to state on behalf of the District Judge and against Attorney Klecan that the attorney had a chance to explain, that there was an actual hearing. This falsehood in the Tenth Circuit Opinion also appears on page 2 of the Opinion when it is stated that "[t]here was also an express finding that the Petition was frivolous, brought in bad faith and for purposes of delay." Again the implication is that there was a hearing and evidence below. Petitioner Klecan has a right to be before this Supreme Court as a victim of an injustice resulting from false charges stated by the lower federal court and the Tenth Circuit Court of Appeals. The right to a good name, professional and personal, has been infringed. This Court recently spoke out unanimously on this point in another type of case involving judicial immunity. In *Dennis* v. *Sparks,* 499 U.S. ——, 66 L.Ed. 2d 185, 190, 101 S.Ct. 183, this Court stated that "[i]mmunity does not change the character of the judge's action", and at page 191, "judicial immunity was not designed to insulate the judiciary from all aspects of accountability." Professional damage was done by unfounded accusations of bad faith, falsely labeled as supported by objective evidence. If accountability is a requisite then clearance of the false charges is something due the victims of false judicial accusations and can be done without material damage to "the judge's integrity and that of the judicial process." *Dennis* v. *Sparks,* supra at 191. A reversal requiring a hearing, Damage to the attorneys has the same cause as damage to the Removals i.e., No Hearing. App. 45a.

The Tenth Circuit Opinion further states that courts have the inherent power to tax attorneys fees against counsel who litigate in bad faith or otherwise abuse judicial process. The term "inherent power" as read in light of the fact that no hearing ever took place must mean that the appellate court agrees

with the lower court that the judiciary can use its own subjective powers of judgment against litigants or attorneys without the benefit of any evidence. The power to judge from legal standards whether a removal meets legal requirements is to be distinguished from an assumed power to judge the motives of the attorney who the Court deemed was responsible for the "lamentable" removal. For judicial officials to claim such powers is dangerous to freedom. The courts below used their powers to give themselves the right to judge an attorney's mind and heart without a hearing and then to impose a punishment based on their internal judgment.

The judicial official in this case sought to elevate his decision by endorsing it with accompanying sanctions against the losing party. The right to question a ruling of the court therefore takes on a new and threatening aspect. In addition the attachment of sanctions forces the losing party to approach a court of review with the burden of overturning not only the legal reasoning of the lower court but also the stigma of the sanctions and the personal convictions of the judge below. The threat to Constitutional liberty is real. What is being substituted for objective legal reasoning is a lower court judiciary which attaches a penal type rider to its decisions so that those decisions will not be questioned. If this is allowed, the mere attempt to remedy the situation would be viewed as an action wrongfully disputing the power now being claimed by the lower court and would be equally susceptible to sanctions. In a very recent case, *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, at the very last page of the Opinion, we find the dilemma in which counsel in the private practice of law and their clients face. The Court there states, "[s]uch resort, if permitted, would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts." This quote was from a dissent by Mr. Justice White in a case involving a civil rights situation. The quoted sentence shows that removing a case, filing a case or appealing a case can present ethical and professional obligations to attorneys and their clients mandating that they proceed as a matter of conscience under

the provisions of the Code of Professional Responsibility to test the ruling of the courts. The above quote, together with the language that preceded it, indicates that the steps that conscientious counsel might be "bound to employ" could be labeled under the circumstances of the *Lynch* case, supra, as a "flanking movement against the system of state courts by resort to the federal forum with review if need be to this court, to determine the issue." It could apply in this case to your Petitioner resorting to the federal forum under § 1443 who was then charged with "lamentable tactics." Justice White puts it on the basis of conscience and uses the specific term "conscientious counsel." It is a true conclusion of "conscientious counsel" that the elimination of hearings and the imposition of sanctions without hearings constitutes a threat to American Constitutional liberties. That this could also be construed as some type of affrontery to the authority of a United States District Court or Court of Appeals only serves to highlight the danger involved. A system whereby a judge takes the authority to substitute his own convictions about the purpose of a legal proceeding instead of taking an evidentiary approach based on reason and authority is a threat to freedom. The motive behind the § 1443 removal and § 1447(d) removal is irrelevant. The obvious purpose behind any removal is to get away from a state court. The Petitions for removal contained very solid reasons for not wanting to be in state court. Those reasons cannot be destroyed because the federal judge wants to interpret the effects of the removal and misjudge the attorney. An attorney cannot change the judge's mind when the judge refuses any hearing.

In *Whatley* v. *City of Vidalia*, 399 F.2d 521, 526 (5th Cir. 1968), we find support for the foregoing position: "it is unimportant what the state prosecuting officer may denominate the conduct of the movants if, in fact, they are exercising a federally granted equal right." The sanctions imposed in this case were improper. They were imposed without any hearing whatsoever, contrary to the holding in *Roadway Express, Inc.*, supra. The District Court erred in imposing the sanctions and the Court of Appeals erred in affirming such sanctions. Access to the courts should not be limited by the threat of sanctions.

Appellants Were Wrongfully Deprived of 28 USC § 1447(d) Appeals of Remands of Their 28 USC § 1443 Removals

The Tenth Circuit Opinion in both Estrada v. Cuaron and Holguin, et al, v. Dawson rely upon the case of *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976), to support their conclusion that they had no jurisdiction under 28 Sec. 1447(d) to entertain an appeal of a 28 § 1443 Removal. The language of the Estrada v. Cuaron Opinion is, "With limited exception, orders remanding removal actions are not reviewable," citing *Thermtron Products, supra.* The attempted removal under § 1443 does not come within the Civil Rights exception to the no-review provision of 28 USC § 1447(d). *Roberts* v. *Ball,* 534 F.2d 63, 5th Cir. 1976, "Appeal dismissed." The *Thermtron* case, supra, allowed a review of the lower court's remand and therefore is directly opposed to this Opinion rather than confirmatory. In addition *Thermtron* dealt solely with § 1441 removals and we are dealing with a § 1443 removal. The Opinion would make shambles of the law on removals and appeals of removals by assuming the power to say that a § 1443 removal which it does not approve is not a § 1443 removal at all.

The language of § 1447(d) should be controlling and does not allow the type of solution applied by the Opinion, for it states unequivocably "except that an order remanding a case to the state court from which it was removed pursuant to § 1443 of this tile (28 USC § 1443) shall be reviewable by appeal or otherwise." Since Daniel Cuaron was the person who had the right to remove under § 1443 and did so, it was not within the power of the federal judiciary at any level to substitute itself and say that he had no right to exercise his removal rights under § 1443. This is what the Opinion wrongfully does when it says his "attempted removal" under § 1443 does not come within the Civil Rights exception to the no-review provision of 28 USC § 1447(d), citing another inapplicable case. In other words the Opinion says that if your § 1443 removal is not meritorious in our eyes, it ceases to be a § 1443 removal, and you have lost your right to appeal the Remand. This is truly an ingenious reasoning process which repeals that

part of § 1447(d) which authorizes an appeal from a remand of a § 1443 removal.

Obviously there is no appeal of a § 1443 remand according to that reasoning. If Petitioner wins in the Federal District Court by not being remanded, of course one has no reason to appeal. If Petitioner loses and is remanded he loses everything including the congressionally granted right to appeal under § 1447 (d). There is a usurpation of a governmental function belonging to Congress by the Court.

Even though in an earlier paragraph the Opinion passes unfavorably on the allegations of the Petition and finds them to "fall far short," the Court is not content with that but goes on to lay down a rule that Remand Orders of § 1443 removals are not even reviewable. It thereby absolves itself from considering the due process failure to accord a due process appeal which obviously § 1447(d) mandated. The decree changes § 1443 removals into something else.

When the Opinion uses the words "attempted removal under § 1443" we find claimed appellate authority by the appellate authority to interfere with Daniel Cuaron's right to remove in his own language. In effect the term "attempted removal" clearly indicates that the Court said "no removal ever took place." Both opinions cite, *Robertson* v. *Ball,* supra, which is really Robertson v. Ball, to support their claimed lack of appellate jurisdiction under 28 U.S.C. § 1447(d). That case holds directly against these opinions. The *Robertson* v. *Ball,* supra case held that an appeal of a 28 U.S.C. § 1441 removal is not appealable under § 1447(d). This is true as a reading of § 1447(d) clearly states. Robertson v. Ball was an appeal of remand of a removal made under both § 1441 and § 1443. The Robertson v. Ball case clearly makes a distinction (page 65) as follows: "The removal effected under § 1443 stands in a different posture, however," and then goes on to state that § 1447(d) makes an exception on a removal pursuant to "§ 1443" and then goes on to state that a § 1443 removal, "shall be reviewable by appeal." At the conclusion of the opinion in Robertson v. Ball, the reasoning stated above is carried into the Court of Appeals decision when it states, "The

part of the Order remanding the cause removed under § 1443 is affirmed. APPEAL DISMISSED in part, and AFFIRMED in part." The Tenth Circuit in our cases has misread Robertson v. Ball, as well as the *Thermtron Products, Inc.*, supra case. Both of those cases prohibit the legal conclusions of the Tenth Circuit that, "The attempted removal under § 1443 does not come within the civil rights exception to the no-review provision of 28 U.S.C. § 1447(d)."

We submit that based on the above, the Tenth Circuit deprived the appellants in both cases of a Constitutional right to an Appeal of the Remand Order of United States District Judge Edwin L. Mechem.

In regard to the above, the Tenth Circuit opinion in our case of *Holguin, et al* v. *Dawson* and *Holguin, et al* v. *Eugene E. Klecan* is made more complex because in *Holguin, et al* v. *Dawson* there was a dual removal alleged under both § 1441 and § 1443. In this respect the *Holguin, et al* v. *Dawson* case more closely resembles *Robertson* v. *Ball,* supra. However, the complete misapplication of the cited cases is carried forward just as completely in *Holguin, et al* v. *Dawson* as it was in *Estrada* v. *Cuaron.* This is evident by the conclusion stated by the Tenth Circuit: "The appeal from the Order remanding the action to the state court is dismissed."

Reference is made to the *Robertson* v. *Ball,* supra conclusion which handled the § 1443 remand by affirming the remand, and that case dismissed the appeal of the § 1441 remand. In a word, the Tenth Circuit in both our cases had completely misapplied the cases they have cited and thus have deprived both appellants of a constitutionally protected appeal under § 1447(d).

Our contention as stated above that the Tenth Circuit fell into substantial jurisdictional error through a misapplication of Thermtron Products, Inc., supra, and the Robertson v. Ball case also carried said court into error in their discussions about the standards for a removal under § 1443, and furnished them a false basis for sanctions against the litigants and the attorney. This probably gave them a false assurance that they

could issue an Order to Show Cause against the attorneys, Klecan, Roach & Santillanes, demanding a permanent injunction personally against the attorneys from filing Civil Rights removals and appeals and also may have been the false basis for an Order requiring the attorneys to show cause why they should not be disciplined (See October 31, 1980 Order To Show Cause of the Tenth Circuit Court of Appeals, Appendix page 78a).

The Robertson v. Ball case has footnotes from the Thermtron Products, Inc., supra, case. One of the footnotes was a suggestion of the Fifth Circuit Panel at the conclusion of the opinion which refers to a "general policy" discussed in Justice Rehnquist's dissent in the Thermtron Products, Inc., supra case. I do not read that footnote to be a request of Justice Rehnquist in his dissent, but rather a footnote of the Fifth Circuit in the Robertson case, which was clearly dicta. That dicta was a suggestion that the Fifth Circuit panel "will look with favor upon a summary motion to dismiss, as frivolous, an appeal from a remand when the removal proportedly based on § 1443 does not even colorably fall within the strict tests set out in Johnson, Georgia and Greenwood, supra." With all this dicta allegedly based upon a policy in a dissent by Justice Rehnquist, there still is not authority to claim that a litigant appealing a § 1443 removal under § 1447(d) has no jurisdiction to be in the United States Court of Appeals. We do not read Justice Rehnquist's dissent as a suggestion to find a removal "frivolous."

The decisive distinction from all the above as applied to our cases, is that no hearing was held at the United States District Court level. We are protesting against the Tenth Circuit Opinions in these cases because their Opinions not only failed to mention that no hearing was granted at the United States District Court level, but even imply that there was a hearing. In Holguin v. Dawson, this false implication of a hearing is contained in the following phrase: "Our review of the record pursuades us." Also, as stated elsewhere, the said Opinion on page 2 states, "There was an express finding," and then further, "The record amply demonstrates." The same

false implication is contained in the Estrada v. Cuaron Opinion: "There is absolutely no support, factual or otherwise, for any claims with respect to the civil rights of the defendants." Facts showing that the adverse party secretly wrote to the presiding judge, thereby initiating a new three-man court, etc., could have been developed at any type of hearing. In a hearing the attention of the federal court to the fact that the state judge while the case was on removal, suggested to the adverse party that he contact United States District Judge Mechem, in an attempt to hurry up a decision on a remand could have been made. There were considerable matters as stated above, which should have been allowed in evidence and would have come out except that the case was remanded within a few hours.

Assertions of Law in the Opinions Were Invalid, and Not Supported By the Citations

Both cases having been rejected in the Tenth Circuit by their ruling on § 1447(d) of no jurisdiction, followed by appeal dismissed, the court went on to give a terse statement about the subject law of Civil Rights. This would be *dicta* because they had denied their own jurisdiction under § 1447(d). They had barred all parties from discussing anything but their lack of jurisdiction under § 1447(d).

The only case cited by the court on Civil Rights substantive law was *Johnson* v. *Mississippi*, 421 U.S. 213, 44 Fd. 121. This case at p. 1594 of 95 SCT Reporter states, "On December 29, 1972, *after an evidentiary hearing was held by the District Court* in which testimony was presented both by petitioner and the Vicksburg chief of police, who was one of the named respondents to the removal petition, the District Court remanded the prosecutions to the state courts" (underlining supplied). Thus *Johnson* v. *Mississippi*, supra, which was based on the allowance of a due process evidentiary hearing in the lower federal court of Mississippi was erroneously used as an alleged basis for the Tenth Circuit approval of a New Mexico Remand Order by Federal Judge Mechem, where *no hearing was allowed.* (Underlining supplied).

No hearing is the central point of our Petitions to this court. *Johnson* v. *Mississippi, supra,* in its fundamental due process stature of an "evidentiary hearing" which the Supreme Court Opinion therein seems to emphasize by its very detailed enumerations of who testified in Vicksburg, Mississippi, loudly and clearly held that § 1443 Removals required an evidentiary hearing in Albuquerque, New Mexico, before Federal Judge Mechem.

We refrain herein from legal arguments about the law of civil rights removals as if they can be considered in a vacuum, that is, without a hearing as to the particular cases, and also because the Tenth Circuit would not allow such arguments anyway. The cases never reach the point of legal requisites and the Tenth Circuit conclusion that the removals fall "short" of the *Johnson* v. *Mississippi,* supra, test is falsely rationalized by citing that case which contained an evidentiary hearing, the identical procedure which is not present in the Tenth Circuit cases.

The Tenth Circuit failure to state there was no hearing below has greater significance than its mere omission. Even stronger reasons for granting our Petition are found in the implications in the Tenth Circuit Opinions that hearings did take place.

We assert that the Tenth Circuit Opinions are misleading and wrongfully state and omit matters with a constitutional significance. A bypassing of the fundamental procedure of getting the facts and allowing due process evidentiary procedures to take place, and a concurrent rash judgment on what the removing petitionrs could or could not show, occurred. Assertions of the factual and legal qualifications to support our removal under 28 U.S.C. § 1443 is a request for the hearing which we were never allowed. We simply desire to be put in the same position as the appellants in *Johnson* v. *Mississippi, supra.* The Tenth Circuit Opinion by not admitting the fact of No-Hearing have placed in the channels of federal law a procedure which would make possible the complete destruction of § 1443 Removals assuming that the lower federal court would remand without a hearing. The fact that these Tenth Circuit

Opinions say "Not for Routine Publication" is no justification and is a further step in the obscurities in the Opinion themselves by which the non-existence of a constitutional hearing is hidden.

In view of the lack of any evidentiary hearings on the Remands plus the fact that the Tenth Circuit refused briefing or argument on the qualifications for a § 1443 Removal plus their dismissals based on lack of jurisdiction under 28 § 1447(d), we believe that trying to project what a hearing would disclose and what legal arguments and legal qualifications are appropriate in applying the law on § 1443 to the hearings on the Removal Petition is premature and would be useless at this stage. The Tenth Circuit never discussed specific allegations of the Removal Petition. The Court obviously wants to prevent § 1443 Removals but their manner is wrong and hence the Petition at this point requires a hearing. *McGee* v. *City of Meridian*, 359 F.2 847 (1966) CCA 5th. Also *Smith* v. *City of Jackson*, 358 F.2d 705 CCA 5th, which states, "Unless a full hearing is accorded a well pleaded removal petition is sufficient shouldering of the removant's burden to overcome a motion for remand." There were no affidavits, verifications or evidence contesting the Petition of Removal. Both sides asked for a hearing in Holguin v. Dawson which was expressly denied by Judge Mechem. "It is further ordered that the parties' requests for hearing on this matter be, and hereby are, denied." (App. 44a.)

The Cuaron vs. Judge Mechem Mandamus issue (App. 68a.) presented by this Petition, is whether a District Judge, on his own motion, can remand a case removed under 28 USC § 1443 without giving the defendant any notice of the remand or any opportunity to be heard. This identical issue was addressed by the Ninth Circuit Court of Appeals in *People of the State of California* v. *Pobuta*, 437 F.2d 1200 (9th Cir. 1971). In that case the District Court denied the removal petition on the same day it was filed without any notice or hearing. The Court of Appeals reversed and remanded the case for a hearing, holding that:

> The district court failed to give petitioner notice of the proposed dismissal and an opportunity to present his argu-

> ments in opposition. It thereby deprived him of the "essence of our judicial system"—"the right to a hearing on the merits of a claim over which the court has jurisdiction." *Harmon* v. *Superior Court*, 307 F.2d 796, 798 (9th Cir. 1962). See also *Potter* v. *McCall*, 433 F.2d 1087 (9th Cir. 1970), and cases cited.

In *City of Baton Rouge* v. *Douglas*, 446 F.2d 874 (5th Cir. 1971), the District Court remanded a case, removed under 28 USC § 1443, without any hearing. The Fifth Circuit Court of Appeals held that "the district court committed error in denying removal without first testing the validity of the assertions at an evidentiary hearing." *City of Baton Rouge*, supra at 875. In *Mardon Walker* v. *State of Georgia*, 417 F.2d 1 (5th Cir. 1969) the court stated that "it is well settled that Section 1443(1) civil rights removal cases require a sufficient evidentiary hearing on the merits of the charges." *Walker*, supra at 5. The court went on to state that a remand to the district court for such a hearing is the usual procedure when no hearing has been held.

In Estrada v. Cuaron the Tenth Circuit states, "Counsel vaguely alleged that the substitution proceedings in the trial court had violated the civil rights of the defendants and their attorneys." This did not constitute a fair summation of what was involved. The major violations alleged dealt with the creation of a three-man court. The Opinion does not state this fact. Judges creating an entirely new court is different from what the Opinion states. The Opinion would indicate that no irregularities had occurred at the state trial court level. No mention is made of a three-man court. This information was available to the Tenth Circuit in the Petition for Removal and also was contained in a transcript furnished to the Tenth Circuit on August 8, 1980, and which appears in this Appendix at page 19a.

Petitioners for Removal have the right to have their Petition considered as they wrote them and not as the same is incorrectly summarized in an opinion. *Walker* v. *State*, 417 F.2d 5 (5th Cir. 1968). The Opinion would imply that the consolidation was pursuant to law and before a lawful tribunal. This conclusion is contrary to the allegations for the Petition for

Removal. Then Tenth Circuit Court of Appeals is making its own findings of fact in an appellate procedure. We point to the following Opinion statement: "We are informed that one of the parties in each of those cases mostly defendants were insured by State Farm Insurance Company." This indicates that the Tenth Circuit did concern itself with some facts and did not restrict itself to the question of its jurisdiction under § 1447(d). Appellants were barred from making any factual arguments, but the court was not. In truth, the factual situation was far different than the assertion in the Opinion. The Opinion is a means of suppression, masked under obscure legal language. Constitutional liberties have been violated to suppress civil rights and liberties. As an example, "There is absolutely no support factual or otherwise for any claims with respect to the civil rights of the defendants." The foregoing dispenses with the necessity for any findings based on evidence and the application of facts to the law. Its basis is solely the authority of the court. Nothing is said as to how they reached this conclusion. In an attempt to fortify its unexplained conclusion it creates an *incorrect time sequence listing of what occurred at the State level.* This occurs when describing the occurrences on July 18, 1980. The Opinion gives number 1 to, "The state trial court entered its order allowing substitution of new counsel," and number 2's listing to, "The petition for removal filed in the District Court." This was not the true time sequence as the Removal and the Remand both occurred prior to the State court's entering its substitution order. We submit that the Opinion falsely seeks to put the proceedings in a light unfavorable to the removing Petitioner. Included at Appendix 87a and 15a is a copy of the Notice of Filing of Petition of Removal which was filed in the New Mexico State Court on July 16, 1980, at 8:50 a.m., and copy of the Order of Substitution by the State District Court which was filed at 4:55 p.m. on July 16, 1980. The time stamps on those two Exhibits are conclusive documentary proof that the Opinion's time sequence is incorrect.

In addition a transcript of the proceedings in the State Court on July 16, 1980, was prepared and submitted to the 10th Circuit for the purpose of showing that contact was made

by the three-man State Court of New Mexico with the U.S. District Court while the Removal was in Federal Court. This contact and the lack of any Motion for a Removal or a hearing raised questions of a lack of due process and propriety in the procedures leading up to the Remand Order filed on the same day. This transcript was filed in the Tenth Circuit Court of Appeals on August 8, 1980. The Appendix includes the first eight pages of the transcript of proceedings in the State District Court which speaks for itself. The transcript continues to the point where the Order of Substitution was made which was filed at 4:55 p.m. on July 16, 1980. On page 4 of the Transcript we see State Judge Baca stating, "We called the Clerk of the Federal Court" and "We don't feel that we are going to proceed at this point until the Federal Court has had an opportunity to act" and "The Clerk of the Court indicated that he would bring it to Judge Mechem's attention, who is the judge assigned over there, as quickly as possible and *perhaps you might want to go over there and see if you can't get in and talk to Judge Mechem and see if you can't get some sort of resolution on that*" (underlining supplied).

This transcript also proves that the Order of Substitution was filed *after* the Removal and Remand and did not occur in the time sequence stated in the Tenth Circuit Opinion.

Subsequent to appeal of the Remand and not until January 1981, did Daniel Cuaron's attorney become aware of the fact that Attorney Simons, who is the person before the State Court on July 16, 1980, was the person who had written the secret letter to Judge Cole requesting help to remove Cuaron's attorney "Gene Klecan." The proceedings of July 16, 1980, Appendix 19a, were the direct result of that letter, secret as to Daniel Cuaron's attorney, and thus we have (a) the secret letter, (b) the judges" meeting of July 10, 1980, and the proceedings of July 16, 1980. The allegations of the Petition indicating a conspiracy under § 1985 are strongly supported at every point. A copy of the minutes of the judges' meeting is in the Appendix at page 27a. It was submitted to the Tenth Circuit as an Exhibit to a Motion entitled "Motion for Reconsideration of Opinions" which Motion was denied by the Tenth

Circuit on February 4, 1981, but said Order granted a stay of mandate so that this Petition for Certiorari could be filed. We are also attaching a copy of an Order from State Judge Cole which denied access to Cuaron's attorney as to the transcript of proceedings in the judges' meeting from which emerged the three-man court which convened on July 16, 1980, as recorded on the transcript. Appendix, page 30a.

The effect of the Remand without a hearing becomes evident. There is a direct relationship between the intensity of a State Court's desire to get a Remand and the necessity and advisability of the Removal. This relationship establishes that Removals and Remands are not matters of Comity.

The above leads us back to our contention that the lack of a hearing is the fundamental error, and it is a constitutional one. The constitutional provision of due process is a limitation upon the judiciary for the benefit of citizens. It is not discretionary. There was a discrimination against Daniel Cuaron at the Federal District Court level because he asserted civil rights and there was a discrimination against him for the same reason at the Appellate level. No federal judge would hear evidence or oral argument. The 10th Circuit Opinion says "this three-judge panel has determined unanimously that oral argument would not be of material assistance."

It certainly is not unusual that the events giving rise to civil rights violations are not susceptible of concrete proof as long as the case is in State Court. Hence a hearing in Federal Court is a necessity in many instances. If the door is shut on a hearing then the secrecy protected by the State is merely given a further protection by the Federal Court which is supposed to provide a forum where the circumstances of the violation can be brought more clearly to light. In this instance the lower federal court added its own unconstitutional actions as a means of frustrating the exposure of civil rights violations occurring in the State under color of law.

A recent decision, *Dennis* v. *Sparks and Lynd*, 449 U.S. ——, 66 L Ed 2d 185, decided November 17, 1980, is epitomized as follows: "Action under 42 USCS § 1983 against private parties

who allegedly conspired with state judge, held maintainable despite judge's immunity." It is desirable that a § 1443 Removal right be accorded to the victims of a conspiracy in violation of 42 USCS § 1985 and not forced back to the tribunals where the conspiracies and civil rights violations are occurring.

In the Holguin, et al v. Dawson, Tenth Circuit Opinion we do not find any treatment of Mechem's reasons as stated in his Order. There is no mention of them. The two Courts are completely dissimilar. Also Judge Mechem's Order makes the following assumption: "Assuming *arguendo* defendant has raised a viable civil rights claim." Even though there was no hearing and therefore no basis for Judge Mechem's assumption, still the Tenth Circuit could not make its own assumption and then make conclusions contrary to those of the trial court. This would be beyond their appellate powers.

The Order to Show Cause Issued By the Tenth Circuit Court of Appeals Constitutes an Unauthorized Interference with the Practice of Law and an Interference with Free Access to the Courts

The above Order is set out in the Appendix at 77a. It was the most grave incident in a course of unconstitutional measures adopted by the federal courts against the Civil Rights litigation under 28 USC § 1443 and against the litigants and their attorneys. Without notice and without any visible motivation and without any request of any kind from any opposing party or opposing attorney the panel of Judges Barrett, McKay and Logan authorized the Clerk to serve this Order to Show Cause. It was directed to the law firm of Klecan & Roach, P.A. and claimed as a basis "judicial notice that attorneys of the firm of Klecan & Roach, P.A. have repeatedly initiated groundless removal actions and frivolous appeals therefrom." The above statement, by referring to other "removal actions and frivolous appeals therefrom" encompassed all the cases covered by this petition. Said other cases were not specifically consolidated, but as said Order indicates, the attorneys of Klecan & Roach were involved in all of said actions

and appeals and were held responsible for all of these matters. The Order to Show Cause states,

> "All members and associates of the firm of Klecan & Roach are directed to appear and show cause why they should not be enjoined from initiating further removal proceedings for purposes of delay or as a incident to the employment dispute with State Farm Insurance Company."

The following paragraph states:

> "The firm of Klecan & Roach are directed to appear and show cause why they should not be subject to professional discipline for violations of the Code of Professional Responsibility, specifically DR 1-102(A)5 and DR 7-102 (A)2."

Klecan & Roach were counsel of record for the petitioner in the mandamus proceeding, who was Daniel Cuaron, who was a petitioner to this court, and his attorneys were "directed to appear and show cause why the Petition for Mandamus should not be dismissed as frivolous." Four named attorneys of the firm of Klecan & Roach were specifically ordered to a hearing in the United States Courthouse in Denver, Colorado, "at 3:30 p.m. on Tuesday, November 18, 1980." On the day of the hearing attorney Eugene E. Klecan asked for a record of the proceedings at the Clerk's office and was informed that it would not be furnished by the court but that the court could be requested to allow a reporter brought to the proceedings by Eugene E. Klecan to make a record. This was not done. At the hearing attorney Eugene E. Klecan did speak, and sometime subsequent thereto, by an Order dated December 11, 1980, which is attached hereto at Appendix 84a, the Petition for Writ of Mandamus was "dismissed as frivolous," and the Order to Show Cause issued by this court is in all other respects quashed." The Motion for Rehearing was filed and denied. Appendix at p. 84a.

The Order to Show Cause is presented as part of this petition and is asserted by the petitioners' attorney Klecan and Roach, P.A. and Eugene E. Klecan and Janet K. Santillanes to have been an unconstitutional movement based upon un-

founded predicates and an interference of the rights of liberty of the attorneys.

> As an illustration, page 1 of the Order to Show Cause says, "The record shows that these attorneys have used the removal procedure for purposes of delay, vexation, and as an incident to their employment dispute with State Farm Insurance Company."

There is no record that so indicates. To the members of the profession of lawyers and judges above and below the Court of Appeals, the conclusions would be drawn that there are evidentiary bases for the statement.

This Order to Show Cause uses the very unconstitutional denial of a hearing as the basis for its accusation of serious delinquency against the attorneys. The Order says that "we take judicial notice" about these attorneys. This judicial notice as used in legal circles means something so clear as to be noncontrovertible. How this can occur and how the Tenth Circuit could claim that it was so clear as to be the subject of judicial notice is but another example of the use of oppressive and unconstitutional deprivations of fundamental rights as a springboard to the further deprivation of constitutional rights and the blackening of the professional names of the attorneys involved. We universally requested from the Tenth Circuit the right of oral argument on all our cases. This was universally denied. The sole time we were permitted to address the Tenth Circuit was in the unconstitutional position of defending ourselves from charges made by this panel based on this Order.

We observe at this time that the statement made by Justice Douglas in a Supreme Court case that lawyers are not second class citizens may not be acceptable in the Tenth Circuit. The initiation and repetition of these damaging and false statements must certainly have some additional explanation more fundamental than a desire to merely harass and punish the attorneys involved. It is apparent from a reading of the Remand Orders and the opinions from the Tenth Circuit that the method of the argumentum ad hominum was employed as a distraction from the unconstitutional denial of the right of a hearing and a due process appeal.

An analysis of paragraph 2 of the Order to Show Cause shows that this panel of federal judges wanted to close the doors of the federal courthouses in the Tenth Circuit to any civil rights removals. It is a clear example of denial to the U.S. citizens in the Tenth Circuit of their right of accessibility to the federal courts. McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972). It is obvious that lay persons cannot frame and execute a civil rights removal petition. Therefore, it is only necessary to intimidate or prohibit attorneys from doing that; and this is what paragraphs numbered 2 and 3 were intended to accomplish. Bias against civil rights removals is obvious.

The attorney firm of Klecan & Roach, P.A. and Eugene E. Klecan and Janet Santillanes personally invoke the jurisdiction of this court. Behind it all is the civil rights issue.

The source of this Order to Show Cause is the same omission that infected their Opinions in the cases themselves which was the absence of a constitutionally required hearing below on the removal. Consequently they substituted their own convictions about the removals and extended their subjective, adverse conclusions about the removals to the attorneys who made the removals.

The failure to have a hearing not being disclosed, the entirely subjective conclusions of the panel were masked. When the Order was quashed the panel still claimed that the Petition for Mandamus was "frivolous" which had no more objective value than the Order had when issued. The November 18, 1980 hearing on the Order gave no support to the charges. The same delinquency is constantly arising as the procedural cause for everything, viz No-Hearing. The Order to Show Cause against the individual attorneys is indicative of an attempt to create a distraction from a consideration of the lack of an evidentiary hearing at the United States District Court level and

a right of appeal under § 1447(d). Attorneys Eugene E. Klecan, Janet Santillanes and Klecan & Roach were made parties to the mandamus proceeding by the Order to Show Cause and included themselves in this Petition. The lack of evidentiary hearing on the removal is the ever-present evil making possible all the wrongs heaped upon the attorneys and their cause by the Order to Show Cause. All roads lead to the same point. We request reversals and orders for hearing, and whatever else this Court deems appropriate.

This sums up our Petition for our clients, our causes and ourselves.

The charge that the attorneys violated the Code of Professional Responsibility by violating a provision which prohibits obstruction of justice is to illustrate the underlying civil rights conflict in which the power of the Tenth Circuit Court of Appeals and the lower federal district court opposed any practical use of civil rights measures.

EUGENE E. KLECAN
520 Sandia Savings Building
Albuquerque, New Mexico 87102

Attorney for Petitioners

APPENDIX

APPENDIX

1. Tenth Circuit Opinion, dated 11/14/80, re Estrada v. Cuaron.

2. Federal District Court Order of Remand, dated 7/16/80, re Estrada v. Cuaron.

3. Petition for Removal, dated 7/16/80, in Estrada v. Cuaron.

4. Notice of filing in state court that case of Estrada v. Cuaron had been removed, dated 7/16/80.

5. Order of Substitution filed in state court in Estrada v. Cuaron on 7/16/80.

6. Partial transcript of the state court proceedings in Estrada v. Cuaron.

7. Minutes of state judge's meeting in Estrada v. Cuaron.

8. Letter from state Judge Cole to Cuaron's attorney denying him access to records of the state judge's meeting.

9. Order of the Tenth Circuit Court of Appeals, dated 8/20/80, concerning summary handling of Estrada v. Cuaron appeal.

10. Order of the Tenth Circuit Court of Appeals, dated 1/16/81, denying the motion for rehearing in Estrada v. Cuaron and Cuaron v. Mechem.

11. Order of the Tenth Circuit, dated 2/4/81, staying the mandate pending Petitions for Certiorari in these cases.

12. Opinion of the Tenth Circuit Court of Appeals, dated 11/14/80, in Holguin v. Dawson.

13. Federal District Court Order of Remand, dated 5/6/80, in Holguin v. Dawson.

APPENDIX TITLES Continued

14. Petition for Removal, dated 4/4/80, in Holguin v. Dawson.

15. Motion to Remand, dated 4/17/80, in Holguin v. Dawson.

16. Order of the Tenth Circuit Court of Appeals, dated 7/9/80, concerning summary disposition of appeal in Holguin v. Dawson.

17. Order of Tenth Circuit Court of Appeals, dated 1/16/81, denying the motion for rehearing in Holguin v. Dawson and Holguin v. Klecan.

18. Petition for Mandamus in Cuaron v. Mechem, dated 7/30/80.

19. Order of the Tenth Circuit. dated 10/31/81, directing Petitioners' attorneys to show cause.

20. Response of Petitioner's attorneys to the Order to show cause.

21. Order of the Tenth Circuit Court of Appeals, dated 12/11/80, reOrder to Show Cause.

22. Request for Hearing in Holguin v. Dawson.

23. Motion to Withdraw Order of Remand in Holguin v. Dawson.

24. Notice of Reference in Support of Motion to Vacate in Holguin v. Dawson.

25. Notice of Deposition.

APPENDIX

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1793

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor,
Plaintiff-Appellee,

v.

DANIEL CUARON, *Defendant-Appellant.*

Appeal from the United States District Court for the District of New Mexico (D.C. No. 80-584-M)

Filed November 14, 1980

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Eugene E. Klecan, Klecan & Roach, P.A., Albuquerque, New Mexico, for Defendant-Appellant.

Thomas A. Simons, IV, Gallagher, Casados & Martin, Albuquerque, New Mexico (substituted attorney) for Defendant-Appellant.

Before BARRETT, MCKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

When the petition for removal was filed, the lead case in a large number of specially consolidated cases were pending in the District Court of Bernalillo County, New Mexico. We are informed that one of the parties in each

of those cases (mostly defendants) were insured by State Farm Insurance Company and represented by the firm of Klecan & Roach, P.A. pursuant to an informal arrangement with the insurance company. For reasons which are not disclosed in the record, the insurance company discharged Klecan & Roach and then sought permission in the state trial court to substitute new counsel for its insureds. In due course, the state trial court consolidated the related cases for the special purpose of hearing and disposition of the request to substitute counsel.

On July 16, 1980 the following occurred:

1. The state trial court entered its order allowing substitution of new counsel;
2. The petition for removal was filed in the district court; and,
3. The district court entered its order remanding the matter back to the state trial court.

Removal was sought under 28 U.S.C. § 1443. Counsel vaguely alleged that the substitution proceedings in the state trial court had violated the civil rights of the defendants *and* their attorneys.

There is absolutely no support, factual or otherwise, for any claims with respect to the civil rights of the defendants. The standards for removal under § 1443 are very narrow and well defined by the statute and by the Supreme Court in Johnson v. Mississippi, 421 U.S. 213 (1975). Stated briefly, the allegations of the petition for removal fall far short of the *Johnson* test.

With limited exception, orders remanding removed actions are not reviewable. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976). The attempted removal under § 1443 does not come within the civil rights exception to the no-review provision of 28 U.S.C. § 1447(d). Roberts v. Ball, 534 F.2d 63 (5th Cir. 1976).

Appeal dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-584-M

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor,
Plaintiff,

v.

DANIEL CUARON, *Defendant*.

ORDER

Filed July 16, 1980

Entered on Docket July 16, 1980

This case was removed from State Court by a petition for removal filed in this court on July 16, 1980. The petition purported to remove the above-named case as well as many other cases which had been filed in state court in Bernalillo County. The cases had been consolidated for the purpose of deciding the issue of substitution of counsel. The petition sought removal pursuant to 28 U.S.C. § 1443. After reviewing the petition, I have concluded that the case was removed improvidently and without jurisdiction. This is not a civil action against any person who is denied or cannot enforce in the state courts a right under any law providing for the equal civil rights of United States citizens. Furthermore, this is not a civil action for any act under color or authority derived from any law providing for equal rights or for refusing to do any act on the ground that it would be inconsistent with such law. Removal under § 1443 is, therefore, inappropriate. Now, therefore,

IT IS ORDERED that the above-named case, as well as the cases consolidated with it, be, and hereby are, remanded to the Bernalillo County District Court.

/s/ EDWIN L. MECHEM
United States District Judge

[SEAL]

CERTIFIED a True Copy of the
original filed in my office.
Jesse Casaus, Clerk

/s/ C. BLUMENTHAL
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 80-584 M

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor,
Plaintiff,

v.

DANIEL CUARON, *Defendant*.

PETITION FOR REMOVAL

COMES Now the defendants in the above-entitled consolidation numbered CV-76-05466, et al, with attached list of consolidated cases, all of which are Bernalillo County, State of New Mexico cases. Attached hereto is the Order of Consolidation and Notice of Hearings to which was attached a list of State Farm cases by state court number only, all of which are covered by the consolidation as appears in the Order signed by Gerald R. Cole, Presiding Judge, and were filed in the Clerk's office of Bernalillo County District Court, New Mexico on July 11, 1980. The cases consolidated are all cases in which Klecan & Roach, P.A. represent one of the Parties, and in most if not all instances the Parties to the litigation represented by Klecan & Roach, P.A. are defendants.

Daniel Cuaron is the head of a group or class wherein a substitution of attorneys from Klecan & Roach, P.A. to an attorney named Thomas A. Simons, IV, and the said Thomas A. Simons, IV seeks to substitute himself as attorney of record and oust Klecan & Roach, P.A. A copy of the Complaint in cause no. 12-76-05466 is attached hereto as Exhibit E.

That the value of the matter in controversy exceeds $15,000.

That on or about July 1, 1980, a New Mexico attorney acting under color of law acted in violation of the defendants' civil rights and against the civil rights of the law firm of Klecan & Roach, P.A. by obtaining an ex-parte order whereby he removed under color of law the attorneys of record of the defendants and substituted himself therein, all in violation of the civil rights of the defendants and the attorneys, by disregarding all Constitutional due process required for the same. That said attorney Thomas A. Simons, IV further violated the Constitutional rights of all concerned by failing to give notice either to the defendants or their attorneys or record, Klecan & Roach, P.A.

That under color of law, several judges of Bernalillo County District Court signed the orders, knowing that the same were ex-parte, and that the defendants had not been given notice of the day on which the said Thomas A. Simons, IV would present himself with numerous orders and seek a judge's signature to the same. There are 68 cases listed on the Exhibit.

That the above procedures were an unconstitutional invasion under color of law of the civil rights of the defendants and their attorneys and constituted an intentional and deliberate attempt to interfere in the relationship of defendants and their attorneys and was an intentional attempt to end it in an illegal manner.

That subsequent thereto a meeting of the District Judges for Bernalillo County was held where the merits of the above-described procedures took place and where it is believed that an opinion on the merits of the above were discussed. That at said meeting the Presiding Judge, Gerald R. Cole, acting under color of law but without authority in law and in violation of the civil and Constitutional rights of the defendants and their attorneys, appointed a panel of three judges to hear and determine all questions of law and fact relative to the illegal attempt of attorney Thomas

A. Simons, IV to obtain for himself the "in-litigation" role of attorney for the named defendants.

That a three-man court and an Order of Consolidation of cases before the three-man court is an invasion of Petitioner's rights under color of law and for which there is no jurisdiction. This constitutes an invasion of the rights of the defendant and an act of discrimination as to all defendants since no authority in law or custom exists for the erection of a three-man court at the District Court level. This is only color of law, and it is in violation of defendant's civil rights, for which the Removal is sought pursuant to 28 USC § 1443.

On or about July 1, 1980, attorney Thomas A. Simons, IV presented himself ex-parte and obtained Bernalillo County Juges' signatures to the Order, a copy of which is attached. Other cases are included in the Exhibit attached to the Order of Consolidation signed by Judge Cole. These Orders were obtained ex-parte on or about July 1, 1980, copies of which are being collected and will be submitted as part of the record on this Removal. The Application for Substitution of Attorneys in cause numbered CV-76-05466 (Cuaron), as attached as Exhibit C. A copy of the unauthorized Entry of Appearance by attorney Thomas A. Simmons, IV is also attached as Exhibit D.

That to force Petitioners to litigate in a hastily assembled panel completely unauthorized by law as to its very creation and to allow one judge to appoint members to sit as a panel are procedures which the Fourteenth Amendment forbids. It is in violation of Petitioners' civil rights.

This Removal is within 30 days of all the act constituting grounds for removal as stated above.

That State Farm Mutual Automobile Insurance Company has illegally, through a licensed attorney Thomas A. Simons, IV, in violation of all due process rights of the defendants, inserted itself into the cases. See Application for Substitu-

tion of Attorneys with attached Affidavits of State Farm Representatives. The attorney-client relationship of Klecan & Roach, P.A. and the defendants is illegally affected. This is in violation of 42 USC § 1985.

The following Exhibits are attached: Exhibit A, Consolidaiton Order; Exhibit B, Ex-Parte Orders; Exhibit C, Application for Substitution of Attorneys; Exhibit D, Entry of Appearance; Exhibit E, copy of Complaint in Estrada v. Cuaron, cause no. 12-76-05466, Bernalillo County, New Mexico.

Removal is sought pursuant to 28 USC § 1443.

KLECAN & ROACH, P.A.

/s/ EUGENE E. KLECAN
Eugene E. Klecan
Attorneys for Petitioners
Suite 520, Sandia Savings Building
Albuquerque, New Mexico 87102

AFFIDAVIT

STATE OF NEW MEXICO
COUNTY OF BERNALILLO, SS.

Daniel Cuaron, being first duly sworn upon his oath, states as follows:

I am the Petitioner in this cause, and for the class, and to the best of my information, belief and personal knowledge, state that all matters contained in this Petition are true and correct.

/S/ DANIEL CUÀRON
Daniel Cuaron

SUBSCRIBED AND SWORN to before me this 15 day of July, 1980.

/S/ PATRICIA L. RICE
Notary Public
Official Seal Patricia L. Rice
Notary Public - New Mexico
Notary Bond filed with
Secretary of State
My Commision Expires 3/19/84

I HEREBY CERTIFY that a true copy of the foregoing Petition will be mailed to opposing counsel July 16, 1980.

/S/ E. E. KLECAN

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

No. CV-76-05466

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor,
Plaintiff,

v.

DANIEL CUARON, *Defendant.*

COMPLAINT

(Filed December 7, 1976)

Comes now the plaintiff, LUIS J. ESTRADA, by and through his attorneys, GALLAGHER, CASADOS & PATTEN, and for his cause of action against the defendant states:

COUNT I

I

The plaintiff, LUIS J. ESTRADA, is the duly appointed and authorized Administrator and Personal Representative of the Estate of Johnny Estrada and at all times material hereto was and is a resident of the City of Albuquerque, County of Bernalillo, State of New Mexico.

II

That the defendant, DANIEL CUARON, at all times material hereto, was and is a resident of the City of Albuquerque, County of Bernalillo, State of New Mexico.

III

That the acts, injuries, and fatality which are the subject matter of this Complaint occurred in the City of Albuquerque, County of Bernalillo, State of New Mexico.

IV

That this action is brought pursuant to the Wrongful Death Act for the State of New Mexico, Sections 22-20-1, et seq., *New Mexico Statutes Annotated, 1953,* by the duly appointed Administrator and Personal Representative of the Estate of the deceased, JOHNNY ESTRADA.

V

That on or about the 5th day of August, 1976, the deceased, JOHNNY ESTRADA, while walking with his brothers in the area of Barcelona and Coors Boulevards, S.W., in Bernalillo County, Albuquerque, New Mexico, was struck by a vehicle being driven by the defendant, DANIEL CUARON; that, as a result of the negligent acts of the defendant Daniel Cuaron, the said Johnny Estrada suffered fatal injuries.

VI

That due to the aforementioned negligent acts of the defendant, which were the sole and proximate cause of the wrongful death of the deceased, JOHNNY ESTRADA, the plaintiff LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of the deceased, and pursuant to Section 22-20-1, et seq., *N.M.S.A., 1953,* is entitled to recover the sum of $100,000.00 in actual damages for the death of his minor son, the deceased, which was solely and proximately caused by the aforementioned negligent acts of the defendant DANIEL CUARON.

WHEREFORE, under Count I, plaintiff LUIS J. ESTRADA, as Personal Representative, prays judgment against the defendant DANIEL CUARON in the amount of $100,000.00, his costs, and for such other and further relief as to the Court seems just and proper.

COUNT II

VII

Plaintiff realleges and incorporates by reference paragraphs I through VI of Count I of this Complaint, as though the same were more fully set forth herein.

VIII

That on or about the 5th day of August, 1976, at the time the accident took place which caused the death of his brother, Johnny Estrada, DAVID ESTRADA, a minor, was walking in the area of Barcelona and Coors Boulevards, S.W., in Bernalillo County, Albuquerque, New Mexico, and was struck by a vehicle being driven by the defendant, DANIEL CUARON; that, as a result of the negligent acts of the defendant, DAVID ESTRADA suffered cuts, abrasions, and other injuries, causing him considerable pain and discomfort and requiring medical treatment.

IX

That due to the aforementioned negligent acts of the defendant, which were the sole and proximate cause of the injuries sustained by DAVID ESTRADA, the plaintiff LUIS J. ESTRADA:

A. As father and next friend of DAVID ESTRADA, a minor, is entitled to recover general damages for and on behalf of such minor in the sum of $10,000.00.

B. As father of said minor, DAVID ESTRADA, is entitled to recover medical expenses incurred and to be incurred on behalf of said minor, DAVID ESTRADA, in the sum of $2,500.00.

WHEREFORE, under Count II, plaintiff LUIS J. ESTRADA prays judgment against the defendant DANIEL CUARON in the amount of $12,500.00, his costs, and for such other and further relief as to the Court seems just and proper.

GALLAGHER, CASADOS & PATTEN
Attorneys for Plaintiff
716 Bank of New Mexico Building
Post Office Box 1189
Albuquerque, New Mexico 87103
Phone: (505) 243-7849

By /s/ DAVID R. GALLAGHER
David R. Gallagher

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

No. 12-76-05466, et al.
Consolidated

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor,
Plaintiff,

v.

DANIEL CUARON, *Defendant*.

NOTICE OF FILING

[STAMP, July 16, '80 A.M. 8:50 Filed]

NOTICE IS HEREBY GIVEN that defendant Daniel Cuaron has filed a Petition for Removal and Bond pursuant to 28 USC § 1443, and has removed this action to Federal Court.

KLECAN & ROACH, P.A.

/S/ EUGENE E. KLECAN
Eugene E. Klecan
Attorneys for Defendants
Suite 520, Sandia Savings Building
Albuquerque, New Mexico 87102
505/243-7731

I HEREBY CERTIFY that a true copy of the foregoing will be mailed to opposing counsel of record on July 16, 1980.

/S/ E. E. KLECAN

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor,
Plaintiff,

v.

DANIEL CUARON, *Defendant*.

[STAMP July 16, '80 4:55 P.M. Filed]

No. 12-76-05466, et al.
(See attached list)
Filed July 16, 1980
STATE FARM CASES

CV-78-01063	CV-79-08756
CV-79-00371	CV-78-05099
CV-78-05618	CV-79-06881
CV-77-08255	CV-79-07952
CV-80-01612	CV-78-04555
CV-80-03888	CV-79-05754
CV-78-08347	CV-79-08146
CV-79-09420	CV-79-02277
CV-80-03059	CV-79-08701
CV-79-09346	CV-80-00255
CV-79-93589	CV-78-0038
CV-80-00856	CV-79-09380
CV-79-06173	CV-79-04187
12-72-06084	CV-79-04500

12-76-05466	CV-77-08288
CV-79-04351	CV-79-05502
CV-78-0146	CV-80-93250
CV-77-06381	CV-78-06616
CV-79-04373	CV-79-02190
CV-79-07468	CV-79-04825
CV-79-03186	CV-78-04354
11-76-05-351	CV-79-01872
12-76-05920	CV-77-03805
CV-79-04290	CV-80-01131
CV-79-09780	CV-79-05344
CV-79-07953	CV-79-04035
CV-77-03701	CV-77-08564
CV-79-02373	CV-80-00418
CV-79-02192	CV-79-02799
CV-79-02898	CV-79-09640
CV-79-10312	CV-79-01430
CV-79-06836	CV-77-08288
CV-79-	CV-80-02561
CV- -	CV-77-96862
CV- -	CV-78-08693
CV- -	CV-78-06789

ORDER

This matter coming on for hearing before the HONORABLE JOSEPH F. BACA, the HONORABLE GENE E. FRANCHINI, and the HONORABLE W. JOHN BRENNAN, notice having been given

to Counsel and State Farm Insurance Company and subsidiary companies appearing through their Attorney Thomas A. Simons, IV, and Klecan & Roach, P.A., appearing not either in person or by Counsel this matter proceeded to hearing. The Court makes the following Findings of Fact and Conclusions of Law and Order as follows:

FINDINGS OF FACT

(1) Mr. Arthur W. Teague and Mr. Gerald W. Strickland, in their capacities as Corporate Officers and employees of the various insurance companies had authority to terminate the services of Klecan & Roach and have effectively done so both orally and in writing.

(2) Notice of said termination was given to all individual insureds by mail, return receipt requested.

(3) The custom and usage and practice with regard to State Farm and subsidiary insurance companies in the selection of Counsel has been that the company selected the Attorneys. The individual insureds are never consulted or their opinions solicited as to their preference of Attorneys.

(4) Each individual insured entered into a written contract with State Farm and subsidiary companies which included a provision with regard to the method of selecting Attorneys.

(5) The policies issued to the various individual insureds with regard to the selection of Attorneys was identical. There was no written agreement ever entered into between State Farm and the Law Offices of Klecan & Roach.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction over the parties and subject matter.

(2) No cause need be established for the termination of the Attorney-Client relationship.

(3) Under the terms of the insurance policy entered into between the individual insureds and State Farm and subsidiary companies, the insureds consent is not required to allow either termination of Counsel or substitution of Counsel.

(4) Mr. Arthur Teague and Mr. Gerald W. Strickland, acting in their capacity as Officers and employees of State Farm Insurance Company and subsidiary insurance companies have the authority to terminate the services of Klecan & Roach and have exercised that authority in these matters.

(5) Thomas A. Simons, IV, has been substituted as Counsel of Record in these cases and is Counsel of record in all the above designated cases.

THEREFORE, it is ORDERED, ADJUDGED AND DECREED that Thomas A. Simons, IV, forthwith shall be substituted as Counsel of Record in all of the above cases and that Klecan & Roach shall be removed as Counsel.

/s/ JOSEPH F. BACA
Joseph F. Baca,
District Judge

/s/ GENE E. FRANCHINI
Gene E. Franchini,
District Judge

/s/ W. JOHN BRENNAN
W. John Brennan,
District Judge

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

No. CV-76-05466, et al

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor.
Plaintiff,

v.

DANIEL CUARON, *Defendant.*

TRANSCRIPT OF PROCEEDINGS

[STAMP Aug. 8, '80, Filed USCA—10th Circuit]

BE IT REMEMBERED that on the 16th day of July, A.D., 1980, this matter came on for hearing at approximately 10:15 a.m. before a Three-Judge Panel consisting of the HONORABLE JOSEPH F. BACA, the HONORABLE GENE E. FRANCHINI, and the HONORABLE W. JOHN BRENNAN of the District Court, Bernalillo County, Albuquerque, New Mexico.

The Plaintiff did not appear in this case, nor did any Attorney acting in their behalf.

The Defendant, appearing through his Counsel of Record, THOMAS A. SIMONS, IV, Attorney at Law, 327 Sandoval, Suite 101, Post Office Box 2341, Santa Fe, New Mexico.

* * * * * * * * * *

JUDGE BACA: This is Civil Cause # 79-02277 et al, in the matter of Thomas A. Simons, IV, obtained an Order for substitution of Counsel in numerous cases one of which is Irene Bentley Luther and others.

The time is now 10:10 and this matter was set for trial this morning at 9:00 before a three Judge panel. At that time or prior to 9:00, Mr. Eugene Klecan was present in

Court and served upon Judge Franchini a notice of filing a docket proporting to remove these proceedings to Federal Court. Mr. Klecan then absented himself from the Courtroom. We have made numerous efforts to call Mr. Klecan back so that we might make a record of the proceedings and to give him an opportunity to respond, and as I view the Courtroom now I do not see Mr. Klecan or anybody from his Office. My secretary personally called Mr. Klecan three or four times and I spoke to his secretary on one occasion. She indicated she had not seen him and he was not present. I think for the record we will make a copy of the Notice of Filing as an Exhibit. (Exhibit marked.

Mr. Simons, you wanted to address the Court on the question of whether or not we have been divested of jurisdiction in this matter of all the cases that have been pending. We have given you an opportunity to research the law and you may address the Court on that issue at this point.

Mr. Simons: Thank-you, Your Honor, if I may address the Court from Counsel table. Today we received a notice of filing of a Petition for Removal which is now in the record and which reads as follows: "Notice is hereby given that Defendant Daniel Cuaron has filed a Petition for removal and bond pursuant to 28 U.S. 143 and has removed this action to Federal Court. It is my contention before this Court that the actions of Mr. Klecan in removing that case regardless of the legality of the actual removal, the rule is that once a case is removed, the State Court retains no further jurisdiction to do anything. It is my position here that even assuming that this is a removal, that this removal is only one of approximately 50 cases that are before this Court for hearing today. The beginning of my analysis of the reason why this is the notice of filing, it states only that the Defendant Daniel Cuaron has filed Petition for removal and bond, and that is one of the many cases that we have. Secondly, Rule 42 provides that con-

solidation may take place on issues in addition to consolidation of cases in general. In this case there has been a consolidation only for the purpose of addressing one person's issue and it is my contention that clearly there is no consolidation of the cases such as to combine all the cases into one so that any one of the Defendants could have removed all of the cases.

The Court asked me to come up with some case law on that point, and I would like to cite to the Court first of all a New Mexico case, *Clark Vs. Queen Insurance Company, 22 New Mexico 368,* and in that case there was a consolidation of approximately 7 cases or eleven cases for trial. If I may quote to the Court from the opinion—"The Order of consolidation made by the trial Court insofar as it material hereto is in the following words; it is herefore ordered that the above entitled causes No. 8403 to 8413 inclusive and each and everyone of them be and hereby are consolidated to be tried as one cause and to be hereafter known as designated Cause No. 8403." There is no indication in our Order that they are consolidated under one cause number. Nonetheless, the Court held that for purposes of filing, a notice of appeal—that one notice of appeal under the case No. 8403 was insufficient. It said that no doubt this Order was made under the provisions of Section 4212, Code 1915 which was the predecessor to Rule 42—a mere casual reading of the Order will disclose it provided for a consolidation of the 11 cases for trial and made no pretention of consolidating the said cases for all purposes. It is evident that Counsel for the insurance company has inadvertently misconstrued the meaning of the Order for they have treated it as though the 11 cases were consolidated. (Read the Section for exact wording.) The question that arises as to whether the 11 separate judgments can be reviewed in the one appeal, that it cannot be done where the consolidation in the trial Court was limited to the trial of those cases is established beyond doubt, and it

cites various case law to that point. Under the Federal Law and Federal Rules the Courts have indicated uniformly that consolidation of cases does not make cases one case. They maintain their separate identity and are consolidated only for purposes of hearing. I would cite to the Court the case of *Johnson Vs. Manhattan Rye Company, United States Supreme Court case at 289 U.S. 479; 53 Supreme Reporter 721* and in that case the Court clearly held that the consolidation provisions under Federal law were consolidated for purposes of trial only they do not merge the causes of action so that each cause of action maintains its own identity. I would also cite to the Court the case of *National Nut Company Vs. Susu Nut Company, 61 F. Supp. 86,* which has the same rule of law and each and every one of these cases they reffirm this position.

JUDGE BACA: Alright, we are going to recess for about five minutes and look at these cases. You might hand up those Federal Reports that you have because we don't have those.

MR. SIMONS: I have the United States cases, but I do not have the 61 F. Supp. 86 case.

JUDGE BACA: Alright, we will recess for about ten or fifteen minutes.

RECESS

FOLLOWING RECESS:

JUDGE BACA: Mr. Simons, we have considered your authority and in addition to that, we called the Clerk of Federal Court because we're not privy to the pleadings that were filed. We were never served with notice and the only notice as far as we can tell are the attachments listing all of the cases not just the one case saying consolidated and it would appear that that raises a question of whether or not all of these cases were in fact removed to Federal Court. We don't feel that we are going to proceed

at this point until the Federal Court has had an opportunity to act. The Clerk of Court indicated that he would bring it to Judge Mecham's attention, who is the Judge assigned over there, as quickly as possible and perhaps you might want to go over and see if you can't get in and talk to Judge Mecham and see if we can't get some sort of resolution on that. We will be prepared to proceed if we can get a resolution on that matter.

MR. SIMONS: Thank-you.

JUDGE BACA: He indicated it probably would be resolved very quickly but we feel because of the nature of the pleadings that were filed over there it raises a cloud as to whether or not—it's not totally clear whether or not he has removed all the cases, but I think it's sufficient to cause us to pause at this point and that is what we intend to do. We're going to recess these proceedings until we hear the action of Judge Mecham and when he has acted, we will then be prepared to proceed. Why don't we tentatively say about 2:00 this afternoon and we will reconvene these proceedings then to determine what has taken place in Federal Court.

MR. SIMONS: Thank-you, Your Honor.

JUDGE BACA: We will be in recess.

RECESS

FOLLOWING RECESS: 2:10 p.m.

JUDGE BACA: This is a continuation of Civil Cause 76-05466, et al. The matter was removed this morning to Federal Court and the panel of Judges felt that we should wait upon the determination by Judge Mecham. I have a certified copy of an Order by Judge Mecham dismissing the remand and in his Order he states, "It is ordered the above named cases, as well as the case consolidated, hereby is remanded to the Bernalillo County District Court." So, I

think at this point we have full jurisdiction to proceed at this time, and I am going to make this Order—a copy of this Order part of the record. This morning I caused to be dictated a notice of hearing for this afternoon. "Notice is hereby given that hearing on this matter is set for two p.m. July 16, 1980, in the Courtroom of the Honorable Joseph F. Baca, Room 408-Division II." Mr. Simons, I trusted you with a copy of that Order to be served on Mr. Klecan and to make a return. Do you have that return or would you recite for the record what you did with that.

MR. SIMONS: Your, Honor, I took an original copy of the notice of hearing and went to the Office of Klecan & Roach and spoke to Gene Klecan personally, handed him a copy of this notice of hearing, and I informed Mr. Klecan at that time this would be a hearing after remand. That service was made upon him at 1:15 on July 16, 1980. I have the original notice of the hearing with the certificate of service. What I would like to do, if the Court would like, is to make a list of all our cases as was done with the original Order and attach that, so that they may file this notice of hearing with certificate of service to be filed in each one of the individual cases.

JUDGE BACA: As well I want you to make a copy of that and make it a part of this record.

MR. SIMONS: Yes, Your Honor.

JUDGE FRANCHINI: Was a copy of the Order of Remand filed by the Federal-District Court filed upon Mr. Klecan?

MR. SIMONS: Your Honor, I delivered a copy of the Order of Remand to the Office of Klecan & Roach at 1:32 p.m. this afternoon and no one responded although the lights were on in the office, but no one responded. After vigorous knocking, I put the Order of Remand, a certified copy of that Order, under the door of their office in plain view of anything who would walk in. In answer to your question, it's my belief that a copy has been served on that law firm prior to this hearing.

JUDGE FRANCHINI: Would you have the affidavit or other pleadings indicate your actions with regard to the delivery of the copy of the Order of Remand from Federal Court, as well when you file it in those cases?

MR. SIMONS: Yes, sir, I will do so.

JUDGE BACA: I have a copy of a letter dated July 16, 1980 from Eugene Klecan addressed to Miss Maria Bond, my secretary, with an attachment of our notice of hearing. The general tender of that letter signed by Mr. Eugene Klecan is that he received some sort of notice and he questions the right of this Court to proceed and generally I would characterize the contents of that letter as—well, I would say from that letter that Mr. Klecan indicates he has no intention to appear at this hearing at this time, and I will make a copy of that letter a part of the record. I think with the concurrence of the other Judges, I am prepared to proceed with the hearing as we have indicated, if there is no negative vote by the other Judges.

JUDGE FRANCHINI: I concur.

JUDGE BRENNAN: I also concur.

MR. WAINWRIGHT: May I address the Court briefly before we begin the hearing on this matter concerning a question.

JUDGE BACA: You may.

MR. WAINWRIGHT: Your Honor, I anticipate that Mr. Klecan will probably file a notice of appealling the Order of remand, and I do have to go, but I have prepared a brief to give the Court the opportunity concerning the fact that this Court will still maintain jurisdiction even after notice of appeal is filed to the Tenth Circuit and I would like to give that to you and leave, and you can make this part of the record because I have no objection to the substitution.

JUDGE BACA: Alright, if you will just pass that up here. Mr. Simons, you may proceed.

MR. SIMONS: In putting together the Order and notice of hearing for today's hearing, we have come across several items that were typographical errors and in the original Orders those have been corrected for the Clerk's Office and I would like to correct those before the Court here so that we would have a correct description of all of the cases that will come on for hearing. In all of these cases opposing Counsel of record has been notified and of course, as we have contended, all of these questions involve common questions of law. We would just like to make sure that all of the Bernalillo County cases will be determined one way or the other today at this hearing.

JUDGE BACA: Alright, you're going to file a document to that effect, is that correct?

MR. SIMONS: Yes, sir, if I could read into the record the numbers of the cases that we would like to have included. One case which is a case against State Farm itself and I had received concurrence of the Independent co-defendant's Counsel for having this heard today which is the case of Mid-Century Insurance Company Vs. *Andrew Vida,* (Phonetic) et al; it is Bernalillo County # 78-04739, and in that case no Order has been entered. We have only filed

* * * * * * * * * * *

STATE OF NEW MEXICO

SECOND JUDICIAL DISTRICT

Minutes of Judges' Conference

July 10, 1980

The regular conference of the District Judges of the Second Judicial District was held July 10, 1980, in the courtroom of District Judge Gerald R. Cole with the following Judges in attendance: Judge Gerald R. Cole, Presiding; Judges Baca, Love, Fowlie, Franchini, Maloney, Madrid, Sanchez, Brown, and Brennan. Those absent were: Judges Stowers, Riordan, Traub, and Baimonte. Also present were: Thomas J. Ruiz, Court Administrator; and Doug E. Mitchell, Assistant Court Administrator.

1. Approval of Minutes:

The minutes of the Judges' Conference of May 8, 1980, were approved unanimously.

2. Impending Absence:

Judge Madrid informed the Judges that the Supreme Court has designated retired Justice Montoya and Judge Angel to handle her cases while she is away.

3. Contract to Defend Mental Cases:

Judge Love felt the County did not give everyone a chance to apply for those positions defending mental illness cases.

Judge Cole suggested a letter be sent to the County stating the Judges have received complaints that all interested parties were not given the opportunity to bid for those positions. No action was taken.

4. Court Clinic:

Judge Sanchez spoke about the history and purpose of the Court Clinic.

After much discussion on the Court Clinic and the seven recommendations, Judge Franchini moved to adopt and approve the seven recommendations.

Judge Cole mentioned that the budget must be put together by September 1, 1980, and the amount of money needed for the Court Clinic must be established by then. Judge Cole suggested that Judge Sanchez be in charge of this. Judge Sanchez agreed.

Judge Maloney seconded the motion made by Judge Franchini.

Judge Baca questioned recommendation #3 regarding the follow-up. He was concerned that this would be infringing on functions of probation and parole. He also was concerned with recommendation #7, he wondered if offering treatment was a Court function.

Judge Franchini amended his motion to state the seven recommendations would be a starting point and a more detailed plan should be forthcoming.

Judge Fowlie seconded the amendment.

Judge Madrid was opposed to recommendation #6 and the second sentence in recommendation #3.

Judge Love moved to approve recommendations #1, #2, and the first sentence in #3 without reservation.

Judge Madrid seconded. The motion passed unanimously.

5. Security at the Juvenile Justice Center:
This matter was deferred until a latter date.

6. State Farm Insurance Substitution of Counsel:

Mr. Simmons wrote a letter to Judge Cole saying he was having great difficulty trying to replace Gene Klecan in all the State Farm cases. Mr. Simmons asked if there could be one case with one conclusion instead of having a great number of cases as he is trying to meet time schedules on the August dockets.

After much discussion on the matter, Judge Love moved to have the cases consolidated and that the Presiding Judge ask the Chief Justice to designate a Judge from this District to try all of these issues.

Judge Brennan seconded the motion. The motion passed with Judge Brown abstaining.

ADJOURNMENT: 1:25 p.m.

APPROVED ON: /s/ THOMAS J. RUIZ

9-11-80

/s/ THOMAS J. RUIZ
Thomas J. Ruiz
Court Administrator

STATE OF NEW MEXICO

SECOND JUDICIAL DISTRICT

January 16, 1981

Mr. Eugene E. Klecan
Attorney at Law
520 Sandia Savings Building
4th and Gold S.W.
Albuquerque, New Mexico 87102

Dear Mr. Klecan:

Mr. Ruiz has referred to me your letter of January 14, 1981, so that I may reply to it as the Presiding Judge of this District.

Until November 1977, judges' meetings were closed. After that, judges' meetings were open to the public, with certain defined exceptions, one of which is discussions of pending cases.

At no time has any person been permitted to review a tape of a closed meeting other than a District Judge who may have missed a particular meeting.

I do not intend to vary court policies for your individual benefit. No other counsel in any of the subject cases has or will have access to the material you request.

/s/ Gerald R. Cole
Gerald R. Cole

GRC:jl

cc: Mr. Tom Ruiz

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

OFFICE OF THE CLERK

August 20, 1980

Eugene E. Klecan, Attorney-at-Law
Suite 520, Sandia Savings Building
Albuquerque, NM 87102

Thomas A. Simons, IV, Attorney-at-Law
P.O. Box 2341
Santa Fe, NM 87501

Re: No. 80-1793, Luis J. Estrada, et al v. Cuaron

Dear Counselors:

This Court has today assigned the captioned case to Calendar C, pursuant to Tenth Circuit Rule 10 as revised on March 12, 1980. The Court is considering summary dismissal of this case for the reason that the Court may lack jurisdiction over it.

Within 15 days of this date, the parties may simultaneously file with the Clerk memorandum briefs in quadruplicate in support of their respective positions. The memoranda should contain proof of service showing the names and addresses of persons or entities served, and may contain citations to relevant legal authorities. *These memoranda should specifically address the question set forth at the bottom of this page.*

Any party may include in his memorandum a statement setting forth reasons why, in his opinion, oral argument should be heard. The memoranda and the trial court record will be reviewed by a panel of three judges. If the three judges unanimously determine that oral argument is not

needed, the case will be submitted for determination without oral argument. No further briefs should be filed until further notice from the Court.

Sincerely,

HOWARD K. PHILLIPS, Clerk

By: /s/ SAUNDRA LEE GRUBB
Deputy Clerk

QUESTION TO BE ADDRESSED:

Does 28 U.S.C. § 1447 (d) authorize appellate review of the remand order appealed from?

cc: J.E. Casados, Gallagher, Casados & Martin, P.C., P.O. Box 1189, Albuquerque, NM 87103

L-7(f) 3/80

NOVEMBER TERM
January 16, 1981

Before Honorable Oliver Seth, Chief Judge
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge
Honorable James E. Barrett, Circuit Judge
Honorable William E. Doyle, Circuit Judge
Honorable Monroe G. McKay, Circuit Judge
Honorable James K. Logan, Circuit Judge and
Honorable Stephanie K. Seymour, Circuit Judge,
United States Court of Appeals

No. 80-1793

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, deceased and as Father and next friend of DAVID ESTRADA, a minor.
Plaintiff-Appellee,

v.

DANIEL CUARON, *Defendant-Appellant.*

This matter comes on for consideration of appellant's petition for rehearing. On it's own motion the court has also reviewed the petition as one for consideration en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was submitted.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel or judge in regular active service on the court having requested that the court be polled on the suggestion for rehearing en banc, Fed. R. App. P. 35, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

/s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

JANUARY TERM

February 4, 1981

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

No. 79-2153

TONY E. MATNEY, *Plaintiff-Appellee,*

vs.

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor, *Defendant-Appellant.*

No. 80-1584

MARIA ELENA HOLGUIN, JAMIE HOLGUIN, husband and wife; RUTH LEGARDA, ALFREDO LEGARDA, husband and wife, *Plaintiff-Appellees,*

vs.

LONNIE DAWSON, *Defendant-Appellant.*

No. 80-1585

MARIA ELENA HOLGUIN, JAMIE HOLGUIN, husband and wife; RUTH LEGARDA, ALFREDO LEGARDA, husband and wife, *Plaintiff-Appellees,*

vs.

LONNIE DAWSON, *Defendant,*

EUGENE E. KLECAN, *Appellant.*

No. 80-1701

RHODA ANN STRICKLAND, as personal representative of the Estate of JOSEPH KAY STRICKLAND, Deceased, *Plaintiff-Appellant.*

VS.

ROOSEVELT COUNTY RURAL ELECTRIC COOPERATIVE, CYCRIL E. CARTER, *Defendants-Appellees.*

No. 80-1792

DANIEL CUARON, et al, *Petitioners,*

VS.

THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

No. 80-1793

LUIS J. ESTRADA, as Administrator and Personal Representative of the Estate of JOHNNY ESTRADA, Deceased, and as father and next friend of DAVID ESTRADA, a minor, *Plaintiff-Appellee,*

VS.

DANIEL CUARON, *Defendant-Appellant.*

The Court has for consideration the following motions of appellants in the captioned cases:

1. Motion for reconsideration in cases Nos. 79-2153, 80-1584, 80-1585, 80-1792, 80-1793;

2. Motion for clarification in Case No. 80-1793;

3. Motions to stay the mandates in cases Nos. 80-1584, 80-1585 and 80-1792, a motion to stay the mandate in case

No. 80-1701, which the Court is treating as a motion to recall and stay the mandate in case No. 80-1793.

Upon consideration whereof, the Court orders.

A. The motions for reconsideration and clarifications are denied.

B. The motion to stay the mandate in case No. 80-1792 is denied. This was an original proceeding before this Court and no mandate issued.

C. The mandates in case No. 80-1701, issued January 27, 1981, and in No. 80-1793, issued November 25, 1980, are recalled.

D. The mandates in cases Nos. 80-1584, 80-1585, 80-1701 and 80-1793 are stayed until March 6, 1981, pending certiorari, and if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellants have timely filed petitions for writ of certiorari in the Supreme Court, the stays shall continue until final disposition by the Supreme Court.

The Clerk shall forward a certified copy of this order to the United States District Court for the District of New Mexico and to the parties of record.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1584

MARIA ELENA HOLGUIN; JAIME HOLGUIN, Husband and Wife, RUTH LEGARDA; ALFREDO LEGARDA, Husband and Wife,
Plaintiffs-Appellees,

v.

LONNIE DAWSON, *Defendant-Appellant.*

No. 80-1585

MARIA ELENA HOLGUIN; JAIME HOLGUIN, Husband and Wife, RUTH LEGARDA; ALFREDO LEGARDA, Husband and Wife,
Plaintiffs-Appellees,

v.

LONNIE DAWSON, *Defendant,*

EUGENE E. KLECAN, *Appellant.*

Appeals from the United States District Court
For the District of New Mexico
(D. C. No. 80-221M)

Filed November 14, 1980

Submitted pursuant to Tenth Circuit Rule 9:

Eugene E. Klecan and Janet Santillanes, Klecan & Roach, P.A., Albuquerque, New Mexico, for Defendants-Appellants Dawson and Klecan.

Tom Foy, Jr. and Stephen M. Williams, Foy & Foy & Jollesten, Silver City, New Mexico, for Plaintiffs-Appellees.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate records, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). These causes are therefore ordered submitted without oral argument.

The underlying tort action (arising from an automobile collision) was commenced on August 31, 1978 in the District Court of Grant County, New Mexico. After a mistrial had been declared upon defendant's motion, the matter was again set for trial. There was an unsuccessful defense request for a continuance. A few days before the second trial was to begin, the law firm representing defendant Dawson petitioned for removal under 28 U.S.C. §§ 1441 and 1443. The district court concluded that the case had been improvidently removed and remanded it to the state trial court. There was also an express finding that the petition was frivolous, brought in bad faith and for purposes of delay. Sanctions in the form of attorney's fees were assessed against defense counsel, personally.

Defendant Dawson appeals from that part of the order remanding the matter back to the state court (No. 80-1584) and counsel appeals from the imposition of sanctions against him (No. 80-1585).

No. 80-1584

The threshold question here is whether this court has jurisdiction to review the challenged remand order under 28 U.S.C. § 1447(d).[1] *See* Thermtron Products, Inc. v. Her-

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[1] "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

mansdorfer, 423 U.S. 336 (1976); Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723 (1977). In the petition, it was alleged that removal was sought under both 28 U.S.C. §§ 1441 and 1443. In support of the § 1443 claim, defendant asserted that a local jury administration procedure may operate to deprive him of his civil rights.

The Supreme Court has established a rigorous standard for removal under § 1443. First, it must appear that the right allegedly denied arises under a federal law providing for specific civil rights stated in terms of racial equality. Second, it must also appear that the removal petitioner is denied or cannot enforce the specfied rights in the state courts. Johnson v. Mississippi, 421 U.S. 213 (1975).

Our review of the record persuades us that the attempted use of the civil rights exception to the no-review provision of § 1447(d) is frivolous and completely without substance. When, as here, the removal does not even colorably fall within the strict test of *Johnson*, the purported appeal should be dismissed. Robertson v. Ball, 534 F.2d 63 (5th Cir. 1976).

No. 80-1585

In this case Attorney Klecan appeals from that part of the district court's order which assessed costs in the amount of $350 (for attorney's fees) against him personally. There was an express finding that the matter had been removed in bad faith, for purposes of delay and that Attorney Klecan "was the prime mover behind the lamentable tactics employed here."

Courts have the inherent power to tax attorney's fees against counsel who litigate in bad faith of otherwise willfully abuse judicial process. Roadway Express, Inc. v. Piper, —— U.S. ——, 100 S. Ct. 2455 (1980). Although other attorneys from Mr. Klecan's firm had some limited participation in the underlying proceedings, in both the state and federal courts, there is no doubt that Mr. Klecan

was actually in charge of the litigation. The record amply demonstrates that the removal litigation was conducted in manifest bad faith and brought solely for purpose of delay. Under such circumstances the imposition of sanctions is fully warranted. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980).

CONCLUSION

No. 80-1584—The appeal from the order remanding the action to the state court is dismissed.

No. 80-1585—The portion of the district court's judgment imposing sanctions against Mr. Klecan is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-221-M Civil

MARIA ELENA HOLGUIN; JAMES HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife,

Plaintiffs,

v.

LONNIE DAWSON, *Defendant.*

ORDER

Filed, May 6, 1980

Entered on Docket, May 6, 1980

This matter comes up for consideration on plaintiffs' motion to remand this action to the Grant County District Court. Plaintiffs claim as grounds for their motion defendant's failure to file a verified petition as required by 28 USC 1446(a), the untimeliness of the filing of the petition, 28 USC 1446(b), and the mootness of defendant's alleged civil rights claim by which he justified removal pursuant to 28 USC 1443(1). Plaintiffs also seek costs incurred in securing remand to State District Court, claiming that the petition for removal is frivolous, vexatious and brought for purposes of delay. For the reasons set out below, the motion to remand will be granted and costs will be awarded against defendant.

The First Amended Complaints filed in this consolidated action set out for the first time the claims on behalf of Jaime Holquin and Alfredo Legarda, husbands of plaintiffs Maria Elena Holquin and Ruth Legarda, the original plaintiffs in these consolidated actions. The husbands' several claims set out in those First Amended Complaints later were deleted by way of amendment in a pretrial or-

der "with the exception of the loss of services of [their] wi[v]e[s]." Pretrial Order, ¶ 8. Contrary to the representation [1] made by defendant in his response to the motion to remand, the husband-plaintiffs did not delete all their claims for relief in the pretrial order, but did so with the clear and unambiguous exceptions set out above. No new claim, therefore, is set out in the pretrial order, as is asserted by defendant as the basis for removal of this action. Because the petition for removal was filed more than thirty days after the filing of the First Amended Complaint, which was the last pleading to raise a new claim on behalf of plaintiffs, the petition is not timely filed. 28 USC 1446(b).

A more precise reason why plaintiffs' motion for remand should be granted also derives from 28 USC 1446(b). The original complaint in this action was removable had a timely petition been filed by defendant. As a result, the second paragraph of § 1446(b), limited to circumstances in which "the case stated by the initial pleading is not

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[1] Defendant's response quotes a sentence from paragraph 8 of the Pretrial Order as follows: " 'The plaintiff, Alfredo Legarda hereby amends Count II of his First Amended Complaint to delete all prayers for relief.' The same deletion occurred as to Jaime Holguin." The response takes the quoted sentence out of context, which misrepresents its effect as to plaintiff Legarda, and flatly misstates the effect of the claimed deletion on the claim of plaintiff Holguin. Whether defendant's misrepresentation of the language in the Pretrial Order is knowing or innocent is a question of serious concern. Given the express language in the Pretrial Order, it is difficult to believe that defendant's argument, which is so far off the mark, is presented in good faith. The sentence quoted, when taken in context, clearly and unequivocally refutes defendant's argument. Only as it is lifted from context in his response can the sentence be relied on by defendant for support, a circumstance which compounds my reluctant apprehension that something here is gravely amiss. Wilful violation of F.R.Civ.P. 11 may subject an attorney to "appropriate disciplinary action."

removable," does not operate to permit the petition at this late date. Nor does 28 USC 1441(c) provide removal jurisdiction in this case. Assuming without deciding that the claims raised by Messrs. Holquin and Legarda in the First Amended Complaint are "separate and independent" claims, they were not joined with "otherwise non-removable claims," which must be the case in order that diversity jurisdiction derive from § 1441(c).

Whether or not defendants' alleged civil rights claim is moot, as contended by plaintiffs, it does not provide a basis for removal jurisdiction in this Court. Assuming *arguendo* defendant has raised a viable civil rights claim, it clearly is not directed at plaintiffs to this action but rather toward the administrative and judicial officials of Grant County. It is they, and not plaintiffs herein, who control and administer the jury selection process in the State District Court, and it is they whom defendant must sue, in a separate action, for any alleged civil rights violations. In such a suit, defendant herein would be a plaintiff, to whom the provisions of § 1443 do not apply.

Having considered the motion and memoranda of counsel and further being fully advised in the premises, I conclude that defendant's petition for removal is frivolous, vexations and brought for the purposes of delay. Defendant filed his petition only days before trial was set in this matter in the State District Court and after a motion for continuance on his behalf had been denied. Additionally, I note that this is not the first time that counsel for defendant has attempted the same tactic to avoid an imminent trial setting in the State District Court. *See, Matney v. Evans,* No. 79-2153 (10th Cir., Apr. 24, 1980). Plaintiffs shall be awarded their costs incurred in securing remand of this case to State District Court as a result of my finding that the Petition for Removal was filed in bad faith and for purposes of delay. Costs shall be borne by defense counsel as I conclude that Mr. Eugene E. Klecan, Esquire,

and not his client, was the prime mover behind the lamentable tactics employed here. The requests for hearing on this matter, filed by both parties, will be denied. Now, Therefore,

IT IS ORDERED that plaintiffs' motion to remand be, and hereby is, granted.

IT IS FURTHER ORDERED that plaintiffs be awarded costs in the amount of $350.00, such costs to be borne by defense counsel, Eugene E. Klecan, Esquire.

IT IS FURTHER ORDERED that the parties' requests for hearing on this matter be, and hereby are, denied.

/s/ EDWIN L. MECHEM
United States District Judge

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ 80 221 M

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife, *Plaintiffs,*

v.

LONNIE DAWSON, *Defendant.*

PETITION FOR REMOVAL

Filed April 4, 1980

COMES NOW PETITIONER LONNIE DAWSON and states:

1. That your Petitioner, Lonnie Dawson, is a citizen of the State of Arizona.

2. That your Petitioner, Lonnie Dawson, is removing cause no. 78-146 and cause no. 78-147, Grant County, New Mexico, which are consolidated cases from Grant County, New Mexico. A copy of the Order of consolidation filed by District Court Judge Ray Hughes is attached as Exhibit 1.

3. That this Removal is pursuant to 28 USCS § 1441 (a) (b) (c). That the Removal action is based on 28 USCS § 1441 and/or § 1443.

The consolidation was based on a common accident in Grant County, New Mexico on or about December 9, 1977, with a common defendant, Lonnie Dawson, the Petitioner herein.

4. That as initially pled, the sole plaintiff in the two consolidated actions were Ruth Legarda and Maria Elena Holguin.

5. That Petitioner now alleges the facts authorizing removal under 28 USCS § 1441. Subsequent in this Petition, the facts upon which 28 USCS § 1443 are based will be stated. That subsequent to the filing of the original Complaints by Ruth Legarda and Maria Elena Holguin (Exhibits 2 and 3 respectively), wherein service was had upon the defendant, Lonnie Dawson, said plaintiffs moved for an Order allowing the filing of Amended Complaints. See Exhibit 1, which is the Order allowing consolidation and which authorized the filing of Amended Complaints with additional parties being added, namely, Jaime Holguin, husband of Maria Elena Holguin, and Alfredo Legarda, husband of Ruth Legarda. That said Amended Complaints were answered by defendant, Lonnie Dawson, on August 9, 1979. That subsequent thereto, plaintiffs Alfredo Legarda and Jaime Holguin abandoned their contentions under the First Amended Complaint as to all claimed items of damages alleged against the defendant in the First Amended Complaint. This dismissal by plaintiffs herein is demonstrated by a proposed Pretrial Order. That said Pretrial Order was the subject of a Court Order as to its execution by the plaintiffs and defendant through their attorneys. A copy of the Order, ordering the Pretrial Order is attached hereto as Exhibit 4. See paragraph 2 of the Order, Exhibit 4, which provides that, "The proposed Pretrial Order shall be submitted to defense counsel by Monday, March 24, 1980," and further provides that "Defense counsel shall provide the final Pre-Trial Order to Judge Hughes by Tuesday, April 1, 1980."

6. It is the subject matter of the Pretrial Order which gives rise to this Removal under 28 USCS § 1441. The pages essential to this Petition are pages 1 and 2 of the proposed Pretrial Order and are attached hereto as Exhibit 5. See page 2, last two paragraphs, for amendments and deletions giving rise to this Removal. This Petition is within the 30 days provided by the Removal Statutes, since Exhibit 5 contains a new cause of action as to the plaintiffs

and is a claim for thirty thousand dollars ($30,000) for each of Jaime Holguin and Alfredo Legarda. Defendant therefore removes this action within the period of time provided by law. That the claim for thirty thousand dollars ($30,000) is for "loss of services" of the wives of the plaintiffs Jaime Holguin and Alfredo Legarda and has not been the subject matter of a previous claim. Said contentions state a new and different cause of action as proposed in the Pretrial Order of March 25, 1980, signed by the plaintiffs' attorney for and on behalf of the plaintiffs herein.

7. That diversity of citizenship exists since the Petitioner is a citizen of the state of Arizona, and the plaintiffs are citizens of the state of New Mexico, and that such diversity existed when the above-mentioned new cause of action was introduced into this lawsuit.

8. That the amount in controversy exceeds ten thousand dollars ($10,000).

9. That Petitioner now alleges the facts authorizing removal under 28 USC § 1443, as follows: That on or before November of 1979, a jury panel of 100 persons was selected for jury service, and that members of this panel served on the jury during an attempted trial of this cause which ended in a mistrial in November, 1979. That substantial numbers of this panel were exposed to extensive voir dire examination, and that members of the jury panel selected to serve on this case were or may have been interviewed by the plaintiffs' attorney after the mistrial. That the discussion which took place on void dire and in the trial gave many members of this panel extensive exposure of the facts and issues in this case. See Exhibit 6 for partial list of jurors who were on a panel which was exposed to facts of this hearing at prior hearing and were called again.

That on March 20, 1980, defendant moved the District Court of Grant County, New Mexico, to call a new jury panel and qualify jurors for the same, but this Motion was

denied. That the jurors to be used in the upcoming April, 1980 trial of this matter will include the 100-member panel described above and a 50-member panel selected in December. Further, that the use of these panels is in violation of the provisions of § 38-5-12, NMSA 1978, which were in effect at the time this suit was filed; these provisions limited jury service to three months after qualification, although this statute was amended in 1979 to extend the time to six months.

That the use of these jury panels constitutes discrimination against the Petitioner and a denial of his equal rights under the Civil Rights Act, and in particular 42 USC § 1983, and the due process clause of the United States Constitution.

10. That this Petition is accompanied by a bond as required by law, conditioned that Petitioner will pay all costs and disbursement incurred by reason of the removal proceedings, should it be determined that the case is not removable or was improperly removed.

WHEREFORE, Petitioner files this Petition for Removal of said action from the District Court of Grant County, New Mexico, to the United States District Court for the District of New Mexico, and prays that the action stand so removed.

/s/ JAMES T. ROACH
James T. Roach
KLECAN & ROACH, P.A.
Attorneys for Petitioner
Suite 520
Sandia Savings Building
Albuquerque, New Mexico 87102
505/243-7731

AFFIDAVIT

STATE OF NEW MEXICO
COUNTY OF BERNALILLO, SS.

James T. Roach, being first duly sworn upon his oath, states as follows:

I am an attorney of record for Petitioner in this cause, and to the best of my information, belief and personal knowledge, state that all matters contained in this Petition are true and correct.

/s/ JAMES T. ROACH
James T. Roach

SUBSCRIBED AND SWORN to before me this 4th day of April, 1980.

/s/ PATRICIA L. RICE
Notary Public

OFFICIAL SEAL

Patricia L. Rice, Notary Public New Mexico
Notary Bond Filed with Secretary of State
My Commission Expires 3/19/84

I hereby certify that a true copy of the foregoing Petition was mailed to opposing counsel of record this 4th day of April, 1980.

James T. Roach

STATE OF NEW MEXICO COUNTY OF GRANT

IN THE SIXTH JUDICIAL DISTRICT COURT

No. CV 78-146

MARIA ELENA HOLGUIN and JAMIE HOLGUIN,
husband and wife, *Plaintiffs,*

vs.

LONNIE DAWSON, *Defendant.*

FIRST AMENDED COMPLAINT

COUNT I

1. Plaintiffs MARIA ELENA HOLGUIN and JAMIE HOLGUIN are residents of Grant County in the State of New Mexico.

2. Defendant, LONNIE DAWSON, is a resident of the State of Arizona.

3. On or about December 9, 1977, the Defendant, LONNIE DAWSON, negligently operated an automobile so as to cause it to collide with an automobile in which the Plaintiff, MARIA ELENA HOLGUIN, was driving.

4. On or about December 9, 1977, the Defendant, LONNIE DAWSON, negligently operated an automobile while in a state of intoxication so as to cause it to come in contact with an automobile which the Plaintiff, MARIA ELENA HOLGUIN, was driving.

5. As a direct and proximate cause of the Defendant, LONNIE DAWSON's negligence, the Plaintiff, MARIA ELENA HOLGUIN, suffered personal injury, loss of income, pain resulting from anxiety for future medical problems, fright and shock at the time of the collision, embarrassment and humiliation at the time of the collision, pain resulting from anxiety due to fear of suspected physical disorders. Pain resulting from anxiety due to fear concerning future medical care. Pain and suffering resulting from anxiety due to

fear of the economic impact on herself and her family as a result of her inability to work, pain and suffering due to anxiety and depression caused by limitations on her normal activity. Anxiety and depression due to prolonged stress, suffering resulting from anxiety and depression due to her loss of her self-image.

6. Plaintiff alleges that as a result of the Defendant's negligence, Plaintiff received severe and substantial injuries.

7. As a direct and proximate cause of Defendant's negligence, Plaintiff has incurred or will incur medical expenses in an undetermined amount.

8. By reason of said injuries so inflicted upon the Plaintiff, Plaintiff has been unable to pursue her usual occupation, resulting in damage to Plaintiff in terms of lost wages. As a result of said injury, Plaintiff was compelled to use hospital services and was compelled to employ physicians to treat such injuries. Plaintiff further alleges that her future medical bills still remain unknown.

9. Plaintiff has incurred severe physical and mental suffering as a result of her injuries.

WHEREFORE, Plaintiff, MARIA ELENA HOLGUIN, prays the Court for judgment against the Defendant, LONNIE DAWSON, as follows:

1. Medical expenses in as yet an undetermined amount.

2. Lost wages in as yet an undetermined amount.

3. Suffering caused by anxiety due to fear of future disease and abnormality——$5,000.00.

4. Fright and shock which she sustained at the time of the collision—$3,000.00.

5. Embarrassment and humiliation she sustained being in public view at the accident scene as a victim —$2,000.00.

6. Pain and suffering she sustained due to anxiety caused by fear of suspected disorders in her body —$3,000.00.

7. Suffering caused by anxiety due to fear of future medical care—$2,000.00.

8. Pain and suffering caused by anxiety due to fear of the economic impact of the collision on herself and her family—$3,000.00.

9. Suffering and pain caused by anxiety due to fear and depression surrounding her loss of the normal enjoyment of life—$15,000.00.

10. Pain and suffering caused by anxiety and depression due to prolonged stress—$3,000.00.

11. Pain and suffering caused by anxiety and depression due to her loss of her self-image as a whole homemaker—$15,000.00.

12. The costs of this action.

13. All further proper relief.

COUNT II

1. All allegations contained in COUNT I above are hereby incorporated into COUNT II. Plaintiff, JAMIE HOLGUIN, alleges that as a result of the Defendant, LONNIE DAWSON's negligence, the Plaintiff, JAMIE HOLGUIN suffered severe mental stress at the time he was notified of his wife's injuries. He further suffered anxiety and depression due to his grief from observing his wife in her state of pain and suffering. He alleges further he has lost the normal enjoyment of life because he and his wife are unable to do things for relaxation which were done prior to the collision. He is suffering from anxiety due to fear of the economic impact of his wife's lost income. He is suffering anxiety and fear due to the loss of assistance and services formerly provided by his wife. And finally, he is suffering anxiety

due to fear of medical disorders which his wife may develop in the future.

WHEREFORE, the Plaintiff, JAMIE HOLGUIN, prays the Court for judgment against the Defendant, LONNIE DAWSON, as follows:

1. For the mental stress in receiving the collision news concerning his wife—$2,500.00.
2. For the suffering caused by the anxiety and depression due to his grief from observing his wife since the injury—$10,000.00.
3. For the loss of his normal enjoyment of life—$15,000.00.
4. For the anxiety and suffering due to fear of the economic impact of his wife's inability to work—$3,000.00.
5. For the suffering caused by the anxiety and fear due to the loss of assistance and services formerly provided by his wife—$10,000.00.
6. For the suffering caused by anxiety due to the fear his wife may develop medical disorders in the future—$2,000.00.
7. The costs of this action.
8. All proper relief.

FOY, FOY & JOLLENSTEN

/s/ TOM FOY, JR.
Tom Foy, Jr.
Attorneys for Plaintiffs
P. O. Box 2615
Silver City, New Mexico 88061
Telephone (505) 538-2967

I hereby certify that a copy of the foregoing pleading was mailed to opposing counsel on this 16th day of July, 1979.

/s/ TOM FOY, JR.
Tom Foy, Jr.

STATE OF NEW MEXICO COUNTY OF GRANT

IN THE SIXTH JUDICIAL DISTRICT COURT

No. CV-78-147 (Grant)

RUTH LEGARDA and ALFREDO LEGARDA, husband and wife,
Plaintiffs,

vs.

LONNIE DAWSON, *Defendant,*

FIRST AMENDED COMPLAINT

COUNT I

1. Plaintiffs RUTH LEGARDA and ALFREDO LEGARDA are residents of Grant County in the State of New Mexico.

2. Defendant, LONNIE DAWSON, is a resident of Grant County in the State of New Mexico.

3. On or about December 9, 1977, the Defendant, LONNIE DAWSON, negligently operated an automobile so as to cause it to collide with an automobile in which the Plaintiff, RUTH LEGARDA, was riding.

4. On or about December 9, 1977, the Defendant, LONNIE DAWSON, negligently operated an automobile while in a severe state of intoxication so as to cause it to come in contact with an automobile in which the Plaintiff, RUTH LEGARDA, was riding.

5. As a direct and proximate cause of the Defendant, LONNIE DAWSON's negligence, the Plaintiff, RUTH LEGARDA, suffered personal injury, loss of income, pain resulting from anxiety for future medical problems, fright and shock at the time of the collision, embarrassment and humiliation at the time of the collision, pain resulting from anxiety due to fear of suspected physical disorders. Pain resulting from anxiety due to fear concerning future medical care. Pain

and suffering resulting from anxiety due to fear of the economic impact on herself and her family as a result of her inability to work, pain and suffering due to anxiety and depression caused by limitations on her normal activity. Anxiety and depression due to prolonged stress, suffering from anxiety and depression due to her loss of her self-image.

6. Plaintiff alleges that as a result of the Defendant's negligence, Plaintiff received severe and substantial injuries. She received a cracked left forearm and a contusion or rupture of muscles in the left forearm. Plaintiff also received severe injuries to her chest. At the present time the injuries consist of broken ribs and a collecting of fluid in the chest. Plaintiff also has received injuries to her neck and spine.

7. As a direct and proximate cause of Defendant's negligence, Plaintiff has incurred or will incur medical expenses in an undetermined amount.

8. By reason of said injuries so inflicted upon the Plaintiff, Plaintiff has been unable to pursue her usual occupation, resulting in damage to Plaintiff in terms of lost wages. As a result of said injury, Plaintiff was compelled to use hospital services and was compelled to employ physicians to treat such injuries, and for the service of such physicians, Plaintiff has incurred liabilities and debts in the amount of $566.77, all of which sums were necessary, reasonable and proper. Plaintiff further alleges that her future medical bills still remain unknown.

9. Plaintiff has incurred severe physical and mental suffering as a result of her injuries.

WHEREFORE, Plaintiff, RUTH LEGARDA, prays the Court for judgment against the Defendant, LONNIE DAWSON, as follows:

1. Medical expenses in as yet an undetermined amount.

2. Lost wages in as yet an undetermined amount.

3. Suffering caused by anxiety due to fear of future disease and abnormality—$5,000.00.

4. Fright and shock which she sustained at the time of the collision—$3,000.00.

5. Embarrassment and humiliation she sustained being in public view at the accident scene as a victim —$2,000.00.

6. Pain and suffering she sustained due to anxiety caused by fear of suspected disorders in her body —$3,000.00.

7. Suffering caused by anxiety due to fear of future medical care—$2,000.00.

8. Pain and suffering caused by anxiety due to fear of the economic impact of the collision on herself and her family—$3,000.00.

9. Suffering and pain caused by anxiety due to fear and depression surrounding her loss of the normal enjoyment of life—$15,000.00.

10. Pain and suffering caused by anxiety and depression due to prolonged stress—$3,000.00.

11. Pain and sufferring caused by anxiety and depression due to her loss of her self-image as a whole homemaker—$15,000.00.

12. The costs of this action .

13. All further proper relief.

COUNT II

1. All allegations contained in COUNT I above are hereby incorporated into COUNT II. Plaintiff, ALFREDO LEGARDA, alleges that as a result of the Defendant, LONNIE DAWSON'S negligence, the Plaintiff, ALFREDO LEGARDA, suffered severe

mental stress at the time he was notified of his wife's injuries. He further suffered anxiety and depression due to his grief from observing his wife in her state of pain and suffering. He alleges further he has lost the normal enjoyment of life because he and his wife are unable to do things for relaxation which were done prior to the collision. He is suffering from anxiety due to fear of the economic impact of his wife's lost income. He is suffering anxiety and fear due to the loss of assistance and services formerly provided by his wife. And finally, he is suffering anxiety due to fear of medical disorders which his wife may develop in the future.

WHEREFORE, the Plaintiff, ALFREDO LEGARDA, prays the Court for judgment against the Defendant, LONNIE DAWSON, as follows:

1. For the mental stress in receiving the collision news concerning his wife—$2,500.00.
2. For the suffering caused by the anxiety and depression due to his grief from observing his wife since the injury—$10,000.00.
3. For the loss of his normal enjoyment of life—$15,000.00.
4. For the anxiety and suffering due to fear of the economic impact of his wife's inability to work—$2,500.00.
5. For the suffering caused by the anxiety and fear due to the loss of assistance and services formerly provided by his wife—$10,000.00.
6. For the suffering caused by anxiety due to the fear his wife may develop medical disorders in the future—$2,000.00.

7. The costs of this action.

8. All proper relief.

FOY, FOY & JOLLENSTEIN

/s/ TOM FOY, JR.
Tom Foy, Jr.
Attorneys for Plaintiffs
P. O. Box 2615
Silver City, New Mexico 88061
Telephone (505) 538-2967

I hereby certify that a copy of the foregoing pleading was mailed to opposing counsel on this — day of ———, 1979.

/s/ TOM FOY, JR.
Tom Foy, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-80-221-M

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husand and wife, *Plaintiffs,*

vs.

LONNIE DAWSON, *Defendant.*

MOTION TO REMAND

COMES NOW MARIA ELENA HOLGUIN, JAIME HOLGUIN, RUTH LEGARDA, and ALFREDO LEGARDA, through their attorneys of record, FOY, FOY & JOLLENSTEN, P.A., and moves the Court to REMAND the above-entitled matter to the Grant County District Court, and as grounds therefore states:

1. The PETITION FOR REMOVAL is nothing more than a frivolous attempt on the part of the Defendant, his attorney, and his insurance carrier to stall and otherwise unduly delay the cause of action which was filed in Grant County, New Mexico, District Court more than two (2) years ago.

2. The matter was scheduled for trial in Grant County District Court on Tuesday, April 8, 1980. On Thursday, March 20, 1980, opposing counsel, EUGENE KLECAN, requested District Court Judge Ray Hughes for a continuance. MR. KELCAN's request was denied. The PETITION FOR REMOVAL is nothing more than a subterfuge to gain the continuance which was denied by District Court Judge Ray Hughes.

3. The PETITION FOR REMOVAL in which LONNIE DAWSON indicates he is the Petitioner is not verified and therefore the PETITION FOR REMOVAL should be struck pursuant to 28 USCS Section 1446(a).

4. The PETITION FOR REMOVAL should be dismissed and this cause should be remanded because the PETITION was not filed in a timely fashion pursuant to 28 USCS Section 1446(b).

5. The PETITION was filed on Friday, April 4, 1980. The trial was to begin on the following Tuesday. It should be pointed out opposing counsel did not even give the Court, the Court Clerk, or opposing counsel the courtesy of a phone call indicating the PETITION FOR REMOVAL would be filed. This attorney spent his Easter holiday preparing for the trial to begin on Tuesday. This attorney had numerous witnesses subpoenaed. This attorney spent half of the Monday before the trial interviewing witnesses and preparing for trial. This attorney did not know until noon the day before the trial that the PETITION FOR REMOVAL had been filed.

6. It is interesting to note the PETITION FOR REMOVAL was filed by attorney JAMES T. ROACH. In his Affidavit he indicates that the matters contained in the PETITION are true and correct. MR. ROACH was not present at any of the hearings, conferences, or other matters relating to this case. The first contact MR. ROACH has had with this matter was the PETITION FOR REMOVAL.

7. Evidentally MR. ROACH is contending at paragraph 6 of the PETITION FOR REMOVAL that the contentions in the Pre-Trial Order state a new and different cause of action. He evidentally feels that the new and different cause of action was first presented to the Defendant on March 25, 1980. He therefore concludes that the PETITION is timely filed because it was filed within thirty (30) days from March 25, 1980. It is understandable MR. ROACH would make this mistake in view of the fact he knows nothing about the case.

8. The FIRST AMENDED COMPLAINT filed on behalf of MARIA ELENA HOLGUIN and JAIME HOLGUIN was filed on July 18, 1979. A copy of the FIRST AMENDED COMPLAINT is attached

hereto labeled Exhibit "1" and incorporated herein. In Count II of the First Amended Complaint in paragraph 1, Mr. Holguin stated he was suffering anxiety and fear because of the loss of assistance and services formerly provided by his wife. The Answer to First Amended Complaint filed by Mark Klecan of Klecan's law firm denied the loss of services allegation on August 7, 1979. A copy of the Answer to First Amended Complaint is attached hereto, labeled Exhibit "2", and incorporated herein. It is obvious the loss of service issue was first created back in August of 1979. It is further obvious that it has been more than thirty (30) days since August of 1979.

9. The First Amended Complaint was filed by Alfredo Legarda on July 18, 1979. A copy of same is labeled Exhibit "3", attached hereto and incorporated herein. The Court's attention is directed to Count II of the Complain wherein Mr. Legarda requests compensation for loss of assistance and services formerly provided by his wife. When Mark Klecan was still working for his father he answered the Complaint on August 7, 1979. A copy of the Answer to First Amended Complaint is labeled Exhibit "4", attached hereto and incorporated herein. It is clear from the Answer that the loss of services allegation was denied in Count II, paragraph 1 of the Answer to First Amended Complaint. It is also clear that more than thirty (30) days have passed since the issue was framed.

10. In addition to the issue being framed in August of 1979, a Pre-Trial Conference was held on October 15, 1979. The Pre-Trial Conference was held before the Honorable Judge Ray Hughes. A copy of the Notice of Setting is labeled Exhibit "5", attached hereto and incorporated herein. The Pre-Trial Conference was the first appearance of Mr. Gene Klecan in the case. The matter had been set for jury trial for four days in Silver City, New Mexico, to begin on November 13, 1979. A copy of the Amended Notice of

SETTING is labeled Exhibit "6", attached hereto and incorporated herein. At that Pre-Trial Conference MR. KLECAN was advised, among other things, that MR. LEGARDA and MR. HOLGUIN would present a loss of services claim against his Defendant for $30,000.00. Judge Hughes ordered TOM FOY, JR. to prepare the Pre-Trial Order and forward it to GENE KLECAN. MR. KLECAN was to forward the Pre-Trial Order to the Judge for approval.

11. On October 29, 1979, TOM FOY, JR. forwarded to EUGENE E. KLECAN the original Pre-Trial Order as well as Plaintiffs' proposed UJI 3.1 and the jury instructions on damages. A copy of MR. FOY's letter of transmittal is labeled Exhibit "7", attached hereto and incorporated herein.

12. MR. KLECAN has the original Pre-Trial Order and the original Pre-Trial Order stated exactly the same thing with regard to amendments to pleadings found at paragraph 8 of the Pre-Trial Order attached to the PETITION FOR REMOVAL. It was the agreement at the Pre-Trial Conference, in courtesy to MR. KLECAN, that he need not file any additional pleadings with regard to this matter.

13. MR. KLECAN would not complete the Pre-Trial Order and forward it to the Judge for signature. MR. KLECAN would not tell opposing counsel his witnesses or exhibits. The matter went to trial on Tuesday, November 13, 1979, without a Pre-Trial Order. TOM FOY, JR. had to make a motion on the second day of trial to order GENE KLECAN to give him his list of witnesses and exhibits. This was argued before Judge Hughes and Judge Hughes ordered MR. KLECAN to comply. The matter was tried before Judge Hughes for three and a half (3½) days before a mistrial was granted at MR. KLECAN's request. During that entire three and a half (3½) day trial MR. KLECAN knew MR. LEGARDA and MR. HOLGUIN's only claims were for loss of services and he was at that time defending against same.

14. In view of TOM FOY'S experience with MR. KLECAN, TOM FOY, JR. felt the only way to get to Pre-Trial Order in this matter was to make a motion to the Court and have the Court order MR. KLECAN to complete the Pre-Trial Order. A MOTION TO COMPEL DEFENDANT TO FINISH THE PRE-TRIAL ORDER was filed on February 19, 1980. A copy of same is labeled Exhibit "8", attached hereto and incorporated herein. Judge Hughes ordere MR. KLECAN to complete the Pre-Trial Order and furnish it to TOM FOY, JR. by April 1, 1980. The hearing on the MOTION TO COMPEL DEFENDANT TO FINISH THE PRE-TRIAL ORDER was in Deming, New Mexico, on March 25, 1980.

15. The allegations contained in paragraph 9 of the PETITION FOR REMOVAL are frivolous. Opposing counsel would have the Federal Court believe that MR. KLECAN argued that 38-5-12 N.M.S.A. 1978, which was in effect at the time the suit was filed, should control. And therefore, jurors should only be allowed for three (3) months after qualification. It should be pointed out that opposing counsel, EUGENE KLECAN, made no such argument at the hearing in Deming, New Mexico, on March 25, 1980. He argued that certain members of the jury panel should be stricken because it had been more than three (3) months since they had been qualified. At the hearing, MR. KLECAN did not even know the statute had been amended. The amendment had to be pointed out to MR. KLECAN by counsel TOM FOY, JR. and Judge Ray Hughes.

16. Regardless of what MR. KLECAN argued in Deming, New Mexico, concerning the jury panel, the question is moot at this time. The soonest this matter could be set in the Grant County area for a four (4) day jury trial will probably be sometime in the fall. By that time we will have an entirely new jury panel.

WHEREFORE, MARIA ELENA, JAIME HOLGUIN, RUTH LEGARDA, and ALFREDO LEGARDA, pray the Court to remand this matter back to Grant County District Court for further action. The parties further pray the Court to award substantial costs for the filing of this frivolous PETITION.

FOY, FOY & JOLLENSTEN, P.A.

By /s/ TOM FOY, JR.
Tom Foy, Jr.
Attorneys for Plaintiffs
P. O. Box 2615
Silver City, New Mexico 80861
Telephone: (505) 538-2967

I hereby certify that I mailed a copy of the foregoing to opposing counsel of record this 17 day of April, 1980.

/s/ TOM FOY, JR.
Tom Foy, Jr.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

OFFICE OF THE CLERK

C404 United States Courthouse
Denver, Colorado 80294

July 9, 1980

Mr. Lonnie Dawson
Ms. Wendy M. Bickel
Mr. Eugene E. Klecan
Klecan & Roach
520 Sandia Savings Bldg.
4th & Gold, S.W.
Albuquerque, N.M. 87102

Re: No. 80-1584, Holguin, et al v. Dawson

Dear Counsel:

This is to advise that a motion to affirm has been filed in the above designated case. Pursuant to Local Rule 9(c), you have fifteen (15) days from the date of this letter in which to respond to that motion.

A response to the motion (original and three copies) may be filed with the clerk with proof of service on the opposing party.

Upon the filing of the response or the expiration of time therefor, the matter will be submitted to the court for consideration and appropriate disposition. See 10th Cir.R. 9 (1979).

Very truly yours,

HOWARD K. PHILLIPS, Clerk

By: /s/ MARGARET LEMMONS
Deputy Clerk

cc: Mr. Tom Foy, Jr., Mr. Stephen M. Williams, Foy & Foy & Jollensten, P.O. Box 2615, Silver City, N.M. 88061

NOVEMBER TERM
January 16, 1981

Before Honorable Oliver Seth, Chief Judge
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge
Honorable James E. Barrett, Circuit Judge
Honorable William E. Doyle, Circuit Judge
Honorable Monroe G. McKay, Circuit Judge
Honorable James K. Logan, Circuit Judge and
Honorable Stephanie K. Seymour, Circuit Judge,
United States Court of Appeals

No. 80-1584

MARIA ELENA HOLGUIN; JAIME HOLGUIN, Husband and Wife, RUTH LEGARDA, ALFREDO LEGARDA, Husband and Wife,
Plaintiffs-Appellees,

v.

LONNIE DAWSON, *Defendant-Appellant.*

No. 80-1585

MARIA ELENA HOLGUIN; JAIME HOLGUIN, Husband and Wife, RUTH LEGARDA, ALFREDO LEGARDA, Husband and Wife,
Plaintiffs-Appellees,

v.

LONNIE DAWSON, *Defendant,*

EUGENE E. KLECAN, *Appellant.*

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was submitted.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel or judge in regular active service on the court having requested that the court be polled on the suggestion for rehearing en banc, Fed. R. App. P. 35, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

/s/ ROBERT L. HOECKER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 80-1792

DANIEL CUARON, et al., *Petitioners,*

-vs-

THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

PETITION FOR WRIT OF MANDAMUS

Received July 30, 1980

Petitioners Daniel Cuaron and the individual defendants in the 67 cases consolidated with *Estrada* v. *Cuaron* apply for a Writ of Mandamus directed to the Honorable Edwin L. Mechem, Judge of the United States District Court for the District of New Mexico. This Petition is made pursuant to Rule 21 of the Federal Rules of Appellate Procedure. In support of this Petition, petitioners state:

STATEMENT OF FACTS

Petitioner Daniel Cuaron and the individual defendants in the 67 other cases consolidated with *Estrada* v. *Cuaron* are all defendants in civil lawsuits filed in the state court in Bernalillo County, New Mexico. On July 16, 1980, petitioners removed the 68 cases in which they are involved to the United States District Court for the District of New Mexico. Those cases had been consolidated by order of the state court. The removal was made pursuant to 23 U.S.C. § 1443 based on the violations of petitioners' civil rights, as will be discussed below. No motion to remand was ever filed. However on July 16, 1980, the very same day that the lawsuits were removed to Federal Court, respondent Edwin L. Mechem entered an order remanding the 68 con-

solidated cases to state court. No hearing was ever held on the removal or remand. Petitioners appealed the Order of Remand on July 17, 1980. That appeal was filed pursuant to 28 U.S.C. § 1447 which allows appeal of an order remanding a case which was removed pursuant to § 1443. Despite the fact that the remand order has been appealed, the state court judges have proceeded to act on these consolidated cases, to petitioners' detriment. Therefore this Petition for Mandamus is necessary to prevent irreparable harm to petitioners.

Petitioners have all been represented by the law firm of Klecan & Roach, P.A., since the inception of the lawsuits filed against them. An attorney-client relationship exists between Klecan & Roach, P.A., and each of the petitioners. None of the petitioners has ever requested, authorized or consented to a substitution of their attorneys. Petitioners are all insured by State Farm Insurance Company. That Company has an obligation to defend the claims against petitioners. The obligation of State Farm to its insureds is one requiring strict performance in utmost good faith. Without regard to the potential prejudice to petitioners' rights, State Farm hired an attorney, Thomas Simons, to substitute himself as petitioners' attorney, without the consent and against the wishes of the petitioners. On or about July 1, 1980, Thomas Simons obtained ex-parte orders from several judges of the District Court of Bernalillo County, New Mexico. Those orders purported to substitute Thomas Simons as attorney for petitioners. No notice was given to petitioners, or their attorneys, that such orders of substitution would be sought. Petitioners' attorneys, Klecan & Roach, P.A., objected to the ex parte orders of substitution. After such objections, the state court judges either voided the substitution orders or stated that a hearing would be held on those orders. Before such hearings could be held on the individual cases, the 68 cases here involved were consolidated by order of the state court. No motion for consolidation was ever made. No jurisdiction exists for

ordering consolidation of these 68 diverse cases. A panel of three judges was appointed by the state court to decide the substitution of attorneys in the consolidated cases. There is no provision in this state for such a three judge court. That court had no jurisdiction to proceed. Nevertheless it set the matter down for hearing, over petitioners objections. The hastily assembled three judge panel was not a constitutional court and its creation violated petitioners' civil rights. The state court judges were acting under color of law, but without authority in law and in violation of the civil and Constitutional rights of the petitioners.

STATEMENT OF THE ISSUES

There are two issues presented by this Petition for Writ of Mandamus. The first issue concerns the merits of the removal. The second issue concerns the improper remand order entered so hastily, without consideration of petitioners' rights and without any hearing allowed.

The actions of the attorney hired by State Farm Insurance Company were done under color of law. The actions of the state court judges were done under color of law. Petitioners' rights to due process and equal protection of the laws have been violated. There are statutory requirements controlling the substitution of attorneys in New Mexico. N.M. Stat. Ann. § 36-2-14 provides that the only method for changing attorneys is for either the attorney or the client to apply for a change of attorneys. Klecan & Roach, P.A. are the attorneys in these consolidated cases—they have never consented to or requested to without as attorneys for the petitioners. The petitioners are the clients in these consolidated cases—they have never consented to or requested any change of attorneys. The change of attorneys in these 68 cases is being forced upon the clients and upon the attorneys. Petitioners have a right to the equal protection of the laws, including the laws controlling change of attorneys. They have not been afforded equal protection of the laws.

The removal of these 68 consolidated cases was proper under 28 U.S.C. § 1443. That section allows removal of any civil action from state court to federal court by any person who is denied equal civil rights in a state court or for any act under color of authority derived from any law providing for equal rights. These petitioners have been denied equal protection of the laws and the removal was proper.

The remand order was entered on the very day these 68 consolidated cases were removed to federal court. There is no indication on the order as to what time it was signed. However it must have been signed within a few hours of the removal. No motion to remand was ever filed; no hearing was ever held on the removal or on the remand.

Petitioners seek this Writ of Mandamus directing the respondent to hear the remanded action.

STATEMENT OF REASONS
WHY THE WRIT SHOULD ISSUE

A writ of mandamus is an appropriate remedy to require a federal District Court to entertain an action which was improperly remanded. *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976). *London* v. *United States Fire Insurance Company,* 431 F.2d 247 (5th Cir. 1976). The remand of a case which was removed pursuant to 28 U.S.C. § 1443 can be reviewed by appeal or otherwise. 28 U.S.C. § 1447(d). Petitioners have appealed the remand order. However the state District Court judges have continued to act in these cases. Exhibit D to this Petition is a transcript of a hearing before a state court judge held six days after the remand order was appealed. As the transcript indicates, petitioners' attorney, Janet Santillanes of the firm of Klecan & Roach, P.A., was not allowed to speak on behalf of petitioner John Rizzo. The effect is that petitioners are left without adequate representation. The defense of the lawsuits pending against petitioners have been prejudiced by respondent's improper remand order.

Petitioners' civil rights to equal protection of the laws have been violated. Thomas Simons, at the direction of State Farm Insurance Company, has illegally interfered with the attorney-client relationship existing between Klecan & Roach, P.A. and each of the petitioners. Klecan & Roach, P.A. has represented each of the petitioners since the inception of the lawsuits filed against them. An attorney retained by an insurance company represents the insured and not the insurer. *Baily* v. *Reeber,* 283 N.Y.S. 2d 450 (1967). Klecan & Roach, P.A. is defending petitioners against the unwarranted, bad faith interference in their lawsuits on the part of Thomas Simons and State Farm Insurance Company. Without any regard for the prejudice to petitioners' rights, State Farm Insurance Company is attempting to force a substitution of attorneys on petitioners. It has threatened to deny insurance coverage to its insureds who have objected to the unjustified prejudicial substitution efforts. (See Exhibit 6 to this Petition.)

The removal of these 68 consolidated cases was proper under 28 U.S.C. § 1443. That section allows removal of any civil action against any person who cannot enforce their equal civil rights in state court. That statute, on its face, encompasses all types of civil rights violations and is not limited, by its language, to racial discrimination. However the statute has in the past been restrictively construed by the courts to apply only to racial civil rights. *Georgia* v. *Rachel,* 384 U.S. 780 (1966); *Greenwood* v. *Peacock,* 384 U.S. 808 (1966). This construction must, however, be questioned in light of subsequent cases and developments. *University of California Regents* v. *Bakke,* 438 U.S. 294 (1978) had not yet been decided at the time the restrictions in *Georgia* v. *Rachel,* supra and *Greenwood* v. *Peacock,* supra, were placed on 28 U.S.C. § 1443. It is submitted that the *Bakke* decision mandates an overruling of those two cases.

The majority opinion in Bakke makes a decisive statement of Constitutional law at 98 S.Ct. at 2757:

> "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

That language is an explanation of what happened to petitioners in the federal District Court. They were the subject of discrimination for the sake of discrimination within the removal process. The Civil Rights Removal Act, 28 U.S.C. § 1443, was a document asserting civil rights; however, *Rachel* and *Peacock* wrongfully changed its plain meaning, which clearly states "equal civil rights of citizens of the United States," and made it a discriminatory statute by unwarranted judicial statutory construction. The effect of *Bakke* is to necessarily eliminate the restrictions of the interpretations of *Rachel* and *Peacock* and restore § 1443 to its original, expressed clear-cut inclusion of all "citizens of the United States." *Bakke* demonstrates that the restrictions of "race" written into § 1443 by Rachel are themselves unconstitutional.

It is submitted that the right of removal set forth in 28 U.S.C. § 1443 must be held to extend to all situations in which discrimination exists or equal rights have been violated, and not be restricted so as to benefit only a single racial group. Petitioners were therefore entitled to removal under this statute.

Notice and an opportunity to be heard are essential to due process. Petitioners were given no notice that their attorneys had been forced out of the lawsuit and a new, unknown, attorney substituted. The orders of substitution were entered ex-parte and petitioners' rights to due process were thus violated. Petitioners were also denied the opportunity to be heard. Petitioners object to the substitution and believe it prejudices their defense. (See for example, Exhibit E attached to this Petition. The remaining peti-

tioners will submit Affidavits of their own if it would be helpful to this Court.)

Petitioners have been denied due process and equal protection of the laws in state court. They were given no notice and no opportunity to be heard on the forced substitution of attorneys-ex-parte orders were obtained by Thomas Simons in violation of petitioners' rights. Furthermore an unconstitutional state court has asserted jurisdiction over these consolidated cases. A three-judge panel was hastily assembled for the sole purpose of forcing a substitution of attorneys on petitioners. There is no authorization in any state law for such a three-judge panel. It was not a constitutional court. Its formation and its actions were void. Petitioners seek the protection of this Court from the unconstitutional actions of the state court. There is no other adequate remedy at law for the wrongs being committed against petitioners.

A second issue, after the merits of the removal, is the improper procedure followed in remanding these 68 cases. Both *Thermtron* and the principles of due process were violated by the summary manner in which this remand occurred. The Petition for Removal was filed on July 16, 1980. On that same day, the federal district judge summarily ordered that the cause be remanded, without a hearing and without an opportunity for presentation of facts and arguments. No motion to remand was ever filed. Such summary action was clearly improper. In *Harmon* v. *Superior Court of California*, 307 F.2d 796, 798 (9th Cir. 1962), the Court made it very clear that an evidentiary hearing is absolutely required when a determination is made as to the validity of a civil rights claim. In this regard, the Court stated as follows:

> Appellant has attempted, however imperfectly, to state a claim under acts of Congress that expressly give the District Court jurisdiction . . . The claim may be, as appellees assert, entirely spurious. The Complaint may

> well not state a claim upon which relief can be granted. But those are not the questions before us. *The court cannot know, without hearing parties,* whether it may be possible for appellant to state a claim entitling him to relief, however, strongly it may incline to the belief that he cannot. (emphasis added).

Thus, an evidentiary hearing was required prior to any determination concerning the civil rights issue. A federal court may not pre-try any doubtful issues to determine removability. *Daily* v. *Elicker,* 447 F. Supp. 436 (D.C. Colo. 1978).

Summary dismissal, without a hearing, was not authorized in this situation. The speed with which this decision was reached argues against a proper and careful consideration of the issues involved. Jurisdiction was not lacking on the face of the record, and a civil rights question was raised by the Petition for Removal. Clearly, the denial of a hearing was impermissable.

The following Exhibits are attached to this Petition for Mandamus:

Exhibit A—Petition for Removal

" B—Remand Order

" C—Notice of Appeal of Remand Order

" D—Transcript of hearing before Judge Baiamonte

" E—Affidavit of Daniel Cuaron, petitioner

" F—Letter to petitioner Cuaron from State Farm Insurance Company threatening to deny coverage.

Petitioners further state that even if the protections of 28 U.S.C. § 1443 are available only to members of certain racial classes, Petitioner Daniel Cuaron and other individual Petitioners are members of racial classes to which the protections of § 1443 apply. Hispanics, including Daniel Cuaron and other individual Petitioners, are members of a racial class within the meaning of the civil rights statutes. *Gomez* v. *Pima County*, 426 F.Supp. 816 (D.C. Ariz. 1976). *Ortega* v. *Merit Insurance Company*, 433 F.Supp. 135 (D.C. Ill. 1977).

WHEREFORE, Petitioners in these 68 consolidated cases respectfully request that a Writ of Mandamus issue out of this Court directing respondent, or the federal District Court Judge properly assigned to these cases, to decide these consolidated cases which were properly removed from state court to federal court pursuant to 28 U.S.C. § 1443.

KLECAN & ROACH, P.A.

/s/ JANET SANTILLANES
Janet Santillanes
Attorneys for Petitioners
520 Sandia Savings Building
4th & Gold S.W.
Albuquerque, New Mexico 87102
(505) 243-7731 243-4419

SEPTEMBER TERM

October 31, 1980

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges, United States Court of Appeals.

No. 80-1792

DANIEL CUARON, et al., *Petitioners,*

v.

THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

This is an original proceeding in the nature of mandamus. The nominal petitioner challenges the respondent judge's order remanding sixty-eight improvidently removed civil actions back to the state court.

We take judicial notice that attorneys of the firm of Klecan & Roach, P.A. have repeatedly initiated groundless removal actions and frivolous appeals therefrom. The record shows that these attorneys have used the removal procedure for purposes of delay, vexation and as an incident to their employment dispute with State Farm Insurance Company.

We also note that counsel for State Farm, Thomas A. Simons IV, filed a motion for substitution of counsel in one of the cases, Matney v. Evans, No. 79-2153, which failed adequately to disclose to the court the underlying dispute and its possible effect on the petition.

In view of the facts noted by the court, and in accordance with Fed.R.App.P. 46(b) and (c), it is ordered as follows:

1. Counsel of record for petitioner in this case is directed to appear and show cause why the petition for mandamus should not be dismissed as frivolous.

2. All members and associates of the firm of Klecan & Roach are directed to appear and show cause why they should not be enjoined from initiating further removal proceedings for purposes of delay or as an incident to the employment dispute with State Farm Insurance Company.

3. All members and associates of the firm of Klecan & Roach are directed to appear and show cause why they should not be subject to professional discipline for violations of the Code of Professional Responsibility, specifically, DR 1-102(A)(5) and DR 7-102 (A)(2).

4. Attorney Thomas A. Simons IV is directed to appear and show cause why he should not be subject to professional discipline to this court.

5. Written responses to these orders to show cause shall be filed on or before November 10, 1980, together with proof of service on all other parties.

6. The opposite party to this proceeding may file a reply to the response of the other on or before November 17, 1980, together with proof of service on all other parties.

7. The hearing in this matter will be held on the fourth floor of the United States Courthouse in Denver, Colorado at 3:30 p.m. on Tuesday, November 18, 1980. Eugene E. Klecan, James T. Roach,

Wendy M. Bickell, Janet Santillanes, and counsel for State Farm Insurance Company are directed to appear.

8. The clerk is directed to certify service of this order upon all parties to this proceeding.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U.S. Court of Appeals, Tenth Circuit

By /s/ Cheri Bossio
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 80-1792

DANIEL CUARON, et al., *Petitioners,*

-vs-

THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

SPECIAL ENTRY OF APPEARANCE BY EUGENE E. KLECAN AND JANET K. SANTILLANES IN RESPONSE TO THE ORDER TO SHOW CAUSE

Come now Eugene E. Klecan and Janet K. Santillanes and enter their special Entry of Appearance in response to the Order entered in this cause. The Order, dated October 31, 1980, was received by the undersigned on November 5, 1980. We gave first attention to our client's response to the Order and as stated in that response we did not have adequate time to analyze and research the issues raised by the Order. We urge the same lack of due process as to adequate notice as is stated in our client's response. We also assert numerous Constitutional provisions as well as Constitutional guarantees for individual freedom which we assert prevent jurisdiction from being acquired over us by this Court in its October 31, 1980, Order. We assert lack of jurisdiction over the persons of each of the attorneys in Klecan & Roach. We assert a lack of due process under both the Federal Constitution and the Constitution of the State of New Mexico which we submit protects the attorneys and prevents jurisdiction being acquired in Denver, Colorado, or by the panel of the Court issuing the Order. The Supreme Court of the United States has stated that attorneys are first-class citizens and are entitled to the same Consti-

tutional protections as other citizens. *Spevack* v. *Klein,* 385 U.S. 511, 516 (1967). We do wish to acknowledge receipt of the Order and to express our inability in the time allotted to adequately evaluate and research the issues presented and to write and edit a document as an adequate response. We assert that Constitutional protections bar the Order and make it void as to the undersigned. This is based on an unconstitutional time period in which to file a mandated response and other Constitutional safeguards which are stated herein but for which no time was allowed in which they could be analyzed and submitted. The Order dated October 31, 1980, was entered in a mandamus proceeding and it is not understood how injunction and disciplinary proceedings have become involved in this mandamus proceeding. This response is by way of special appearance since the undersigned assert lack of personal jurisdiction over them. We do not waive our objections to lack of personal jurisdiction by filing this Response but are merely complying with the Court's Order without submitting to jurisdiction. The undersigned also assert lack of jurisdiction to order attorneys who are citizens of New Mexico and who reside in New Mexico to leave that state and go to the state of Colorado.

The Order intermingles other litigation, including litigation not yet filed or contemplated, and other matters, including injunction and disciplinary matters, into the mandamus proceeding. The Petition for Mandamus was filed by Daniel Cuaron, a client and a citizen of the State of New Mexico. How all these other matters can be forced into Mr. Cuaron's mandamus proceeding is not understood. We assert the same lack of jurisdiction and invasion of Constitutional rights for ourselves as we did for him.

We have been ordered to file a written response by November 10, 1980, to an order to show cause why a proposed injunction should not be issued. Again, inadequate time has been allowed and the matter of an injunction cannot be properly analyzed. However in passing it is noted that an injunction can only be issued against someone who is a party to litigation. The undersigned are not parties to this mandamus proceeding and it is not understod how any injunction could be contemplated against them. Furthermore an injunction can only be issued against a party over whom the Court has personal jurisdiction. The lack of personal jurisdiction over these attorneys would be a further bar to any injunction. There are certainly other reasons why injunctive relief is without any jurisdictional basis but inadequate time has prevented proper research or analysis.

We know of no Constitutional basis whereby an entire law firm can be eliminated from the practice of law in Albuquerque, New Mexico, for a whole day or more and ordered to Denver in a mandamus action for a New Mexico client. If time were allowed we feel that not only Federal Constitutional arguments and authorities could be mustered as well as State Constitutional provisions which would protect its lawyer citizens from being ordered out of the State. How disciplinary proceedings can be forced upon Petitioner's mandamus case which requests only a simple hearing and asserts a denial of due process for not getting a hearing is not understood. How this mandamus proceeding can become a legal vehicle for claiming vexatious delays, which never took place, and against a firm of attorneys who have long had, as an absolute principle of professional services, truth, is unknown. Of course anyone can make conclusions about anything, including a lawyer's motivations, but how such untruths about lawyers anywhere fit into a summary proceeding by Daniel Cuaron which could have been decided in a very short time one way or the other is

unknown. The attorneys work product in this Petition and accompanying documents is of record.

Our client, Daniel Cuaron, wanted a hearing in the District Court and it seems self-evident that that is all we asked, and are still asking; whether a denial of due process occurred in not getting a hearing below is the only issue before the Court and Constitutional guarantees make this Order void, we respectfully submit.

/s/ Janet Santillanes
Janet K. Santillanes

/s/ Eugene E. Klecan
Eugene E. Klecan
520 Sandia Savings Building
Albuquerque, New Mexico 87102
(505) 243-7731

NOVEMBER TERM

December 11, 1980

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges, United States Court of Appeals.

No. 80-1792

DANIEL CUARON, et al., *Petitioners,*

vs.

THE HONORABLE EDWIN L. MECHEM, Judge of the United States District Court for the District of New Mexico, *Respondent.*

This is an original proceeding in the nature of mandamus. The nominal petitioner challenges the respondent judge's order remanding sixty-eight improvidently removed civil actions back to the state court.

The court has reviewed the record, briefs, memoranda and oral argument presented pursuant to this court's order to show cause issued October 31, 1980.

Being fully advised in the matter, IT IS ORDERED:

1. The petition for writ of mandamus in Case No. 80-1792, Daniel Cuaron, et al. v. The Honorable Edwin L. Mechem, is dismissed as frivolous; and

2. The order to show cause issued by this court is in all other respects quashed.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

STATUTES

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985

(1) *Preventing officer from performing duty.* If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) *Obstructing justice; intimidating party, witness, or juror.* If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such

court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) *Depriving persons of rights or privileges.* If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-Prsident, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-80-221-M

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife, *Plaintiffs*,

vs.

LONNIE DAWSON, *Defendant*.

REQUEST FOR HEARING

The Plaintiffs request the Court to set their MOTION TO REMAND for hearing at the Court's earliest convenience. The estimated time for this hearing is three (3) hours.

FOY, FOY & JOLLENSTEN, P.A.

By

TOM FOY, JR.
P. O. Box 2615
Silver City, New Mexico 88061
Telephone: (505) 538-2967

NOTICE OF HEARING

To: LONNIE DAWSON
c/o EUGENE KLECAN
KLECAN & ROACH, P.A.
Attorneys for Defendant
Suite 520, Sandia Savings Building
Albuquerque, New Mexico 87102
Telephone: (505) 243-7731

PLAINTIFFS
c/o TOM FOY, JR.
FOY, FOY & JOLLENSTEN, P.A.
P. O. Box 2615
Silver City, New Mexico 88061
Telephone: (505) 538-2967

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-221-M Civil

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife, *Plaintiffs,*

vs.

LONNIE DAWSON, *Defendant.*

MOTION TO WITHDRAW ORDER OF REMAND

Filed May 16, 1980

COMES Now defendant Lonnie Dawson and moves the Court to withdraw the Order of Remand as being prematurely filed and states in support of the Motion that material evidence on the Removal and Motion to Remand has occurred by virtue of the deposition of the District Court Clerk for Grant County, New Mexico, which deposition was taken pursuant to notice. That said deposition was taken without objection, at which time attorneys for plaintiffs and defendant were present and participated on Thursday, May 1, 1980. That deposition is being prepared and will be filed and does contain evidence that the Court should consider. That a failure to recognize the potential materiality of the deposition of the District Court Clerk of Grant County, New Mexico is a deprivation of "due process." That a Petition for Removal demands a hearing so that facts can be presented so that a legal evaluation can be made by the Court on the allegations of the Petition and the Removal. That we believe the deposition will show that no

new names have been taken from the voters' rolls in Grant County for more than two years, and that the present Clerk was not able to determine when the names that are in the wheel were drawn from the rolls.

Also, there are many other matters material to the Removal: That defendant Lonnie Dawson is a resident of the State of Arizona and entitled to due process rights relative to removal and remand according to the Constitution of the United States; that said "due process" guarantees an opportunity of present evidence relative to the issues which was denied by virtue of the remand filed before the Court had an opportunity to consider the deposition of the District Court Clerk of Grant County, New Mexico, which is being prepared; that the procedures whereby an open court hearing is denied to the defendant Lonnie Dawson, and where no opportunity to argue to the Court personally in such a Petition is given is also a denial of due process.

WHEREFORE, defendant Lonnie Dawson prays that the Order of Remand be withdrawn and that the Court consider the deposition of the District Court Clerk of Grant County, New Mexico and that the Court set a date for a hearing in open court with argument by counsel on both sides. Defendant further moves the Court that an imposition of sanctions in the sum of three-hundred fifty dollars ($350.00), which is described as costs and which is to be borne by defense counsel Eugene E. Klecan, Esq., be set aside as being without jurisdiction and entered improvidently and without an opportunity to respond or defend. That said order is without authority and contrary to the "due process" rights under the Constitution of the United States of America and

the State of New Mexico as to the petitioner Lonnie Dawson and Eugene E. Klecan, attorney.

KLECAN & ROACH, P.A.

/s/ EUGENE E. KLECAN
Attorneys for Defendant Lonnie Dawson
Suite 520, Sandia Savings Building
Albuquerque, New Mexico 87102
505/243-7731

/s/ EUGENE E. KLECAN

The person against whom a money judgment was ordered.

I HEREBY CERTIFY that true copy of the foregoing Motion was mailed to opposing counsel this 16th day of May, 1980.

/s/ E. E. KLECAN

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-221-M Civil

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife, *Plaintiffs,*

vs.

LONNIE DAWSON, *Defendant.*

NOTICE OF REFERENCE IN SUPPORT OF MOTION TO VACATE ORDER OF MAY 6, 1980

Filed May 16, 1980

Attached hereto is May 8, 1980 Advance Opinions frontpiece, showing due process requirements from the "Constitution of the United States and New Mexico," "that no litigant suffer damage without being given notice and the opportunity to be heard in the matter."

To have denied a hearing which both parties requested is to place the Order of May 6, 1980 in patent conflict with the law as stated in the Exhibit and consequently in patent opposition to the Constitution of the United States of America and the State of New Mexico. That when the appellate court of New Mexico seeks to protect the citizens of the State of New Mexico, who are also citizens of the United States of America, by declaring that they have a double Constitutional right not to suffer judgment without being given notice and the opportunity to be heard. then this takes precedence over a local United States District Court's denial of the hearing requested by both parties.

Erie Ry. v. *Tompkins,* 304 U.S. 64 (1938) has application. The above "due process" afforded citizens of the United States by New Mexico courts gives clear indication of what a Constitutional Right is, per se a personal right in a citizen from encroachment by any governmental body including the judicial branch. It does not come from the judiciary as a discretionary grant as the Declaration of Independence and the Emancipation Proclamation illustrate.

The attached Exhibit Opinion gives protection to petitioner herein, Lonnie Dawson, and also to his attorneys and attorney Eugene E. Klecan since the Order entered a money order against Eugene E. Klecan, and denies all the claims of the petitioner as well.

In particular, but by no means exclusively, movants point out the following invasion of due process as guaranteed in the attached Exhibit. The Order makes a conclusion at page 3, "I conclude" by "having considered the motion and memoranda of counsel and further being fully advised in the premises" did not come from any party to the litigation nor their attorneys. We are unaware, therefore, of what it means, but if the source is from anything factual, legal, etc., it clearly offends Constitutional guarantees.

The denial of a hearing as requested by both parties and a money judgment being entered without a hearing establishes a denial of Constitutional rights. Since the Order is in conflict with "due process" guarantees, and since other litigants in New Mexico have had their State and Federal Constitutional rights defined and protected for "due process," the petitioner herein and his attorney Eugene E. Klecan have been singled out and thus discriminated against within the meaning of their protected civil rights.

How a local United States District Court is "fully advised in the premises" when the courtroom is barred to the parties and their attorneys is unexplained in the Opinion. The

attached Exhibit is a New Mexico negative to that procedure viewed on the level of both Constitutions, State and Federal.

WHEREFORE, petitioner and his attorney move that the Order of May 6, 1980 be vacated.

KLECAN & ROACH, P.A.

/s/ EUGENE E. KLECAN
Attorneys for Defendant Lonnie Dawson
Suite 520, Sandia Savings Building
Albuquerque, New Mexico 87102
505/243-7731

/s/ EUGENE E. KLECAN

The person against whom a money judgment was ordered.

I HEREBY CERTIFY that true copy of the foregoing Motion was mailed to opposing counsel this 16th day of May, 1980.

/s/ E. E. KLECAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-80-221-M

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife, *Plaintiffs,*

vs.

LONNIE DAWSON, *Defendant.*

NOTICE OF DEPOSITION

NOTICE IS HEREBY GIVEN that defendant will take the deposition of the District Court Clerk of Grant County, New Mexico at the Clerk's Office, Grant County Courthouse, Silver City, New Mexico, on Thursday, May 1, 1980, at 10:00 a.m., before a certified court reporter.

/s/

Eugene E. Klecan
KLECAN & ROACH, P.A.
Attorneys for Defendant
Suite 520, Sandia Savings Bldg.
Albuquerque, New Mexico 87102
505/243-7731

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to opposing counsel of record this 25 day of April, 1980.

/s/

cc: Clerk of Grant City Court
Jones & Assoc. depo. reporters